This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

45 Doc 4520.8

45.84.8

Harvard College Library

FROM THE FUND OF

CHARLES MINOT

(Class of 1828).

5 March, 1888.

117-21
29-5

CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1872, AND OCTOBER TERM, 1873.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XVII.

WASHINGTON, D.C.:
W. H. & O. H. MORRISON,
Law Publishers and Booksellers.
1874.

US Doc 45 2d S.
~~33831~~
~~U.S.8.8~~
~~Doc. 14.7~~
HARVARD COLLEGE
MAR 5 1888
LIBRARY.
Mineral Land.

Entered according to Act of Congress, in the year 1874.

BY W. H. & O. H. MORRISON,

In the Office of the Librarian of Congress, at Washington.

CAXTON PRESS OF

SHERMAN & CO., PHILADELPHIA.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

——— ———.*

ASSOCIATES.

HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. WILLIAM STRONG,
HON. WARD HUNT.

ATTORNEY-GENERAL.

HON. GEORGE H. WILLIAMS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

---

* Chief Justice Chase died May 7th, 1873. Some of the cases in this volume were decided during his life, but more after his death, and while the Chief Justiceship was vacant.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 28, 1873, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE. ———— ————, ———.	FOURTH. MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	———. ———. ———— ————.
ASSOCIATES. HON. WARD HUNT, New York.	SECOND. NEW YORK, VERMONT, AND CONNECTICUT.	1872. December 11th. PRESIDENT GRANT.
HON. WM. STRONG, Pennsylvania.	THIRD. PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	1870. February 18th. PRESIDENT GRANT.
HON. N. CLIFFORD, Maine.	FIRST. MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	1858. January 12th. PRESIDENT BUCHANAN.
HON. J. P. BRADLEY, New Jersey.	FIFTH. GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	1870. March 21st. PRESIDENT GRANT.
HON. N. H. SWAYNE, Ohio.	SIXTH. OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	1862. January 24th. PRESIDENT LINCOLN.
HON. S. F. MILLER, Iowa.	EIGHTH. MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	1862. July 16th. PRESIDENT LINCOLN.
HON. DAVID DAVIS, Illinois.	SEVENTH. INDIANA, ILLINOIS, AND WISCONSIN.	1862. December 8th. PRESIDENT LINCOLN.
HON. S. J. FIELD, California.	NINTH. CALIFORNIA, OREGON, AND NEVADA.	1863. March 10th. PRESIDENT LINCOLN.

MEMORANDA.

DEATH OF CHIEF JUSTICE CHASE.

THE Honorable SALMON PORTLAND CHASE, late Chief Justice of this Court, departed this life on the 7th day of May, A.D. 1873.

On Monday, the 13th of October, 1873, the first day of the October Term, a meeting of the members of the bar of the Supreme Court of the United States was held at the Capitol, and was called to order by JAMES MANDEVILLE CARLISLE, Esquire, on whose motion the Honorable REVERDY JOHNSON was made chairman. On taking the chair, Mr. Johnson said:

GENTLEMEN OF THE BAR: Although it has been some months since the sad event occurred which brings us together to-day, our sense of the great loss which the court, the bar, and the country have sustained by the death of the late Chief Justice Chase is as deep as ever.

The loss of any eminent judicial State officer is always greatly to be lamented; but the death of the presiding Judge of the Supreme Court of the United States is more extensively felt and naturally more deplored. The jurisdiction of that high tribunal is so vast and comprehensive, embracing as it does questions which involve not only every variety of personal controversy between the citizens of different States and aliens and our citizens, but more or less, the respective rights of the States and of the United States, and which may at times affect our relations with foreign governments, that the death of one of its members is calculated to fill the public mind with more than ordinary solicitude. The tribunal is to pass upon the acts of the other two departments of the government when cases involving them are properly under judgment, and to decide authoritatively whether they have transcended their legitimate powers. It is also to adjudicate all questions of prize and maritime law; to construe treaties and all questions of public law that may be before them, and to decide conclusively the limits of their own jurisdiction. It has also frequently before it questions of commercial law, which affect, more or less, not only our own commercial community, but in many instances that class in other countries.

It is very obvious, then, that to a proper and enlightened discharge of these several functions an extensive range of legal knowledge—constitutional, domestic, and foreign—is absolutely necessary, as is also a fixed conviction in the public mind that these qualifications are connected with strict impartiality and perfect integrity. It is to the honor of our country

that these qualities have been illustrated from the organization of the court to the present time.

It would be out of place to refer to the associate justices who have constantly adorned the bench, and contributed so much to challenge for it the respect and reverence of the country, and to secure for it a reputation which is as firmly established abroad as it is at home.

As our late loss was that of the presiding judge, it is sufficient to pay a passing tribute to the memory of those who preceded him as well as to that of the late chief. It may with truth be said that no nation in the world has produced abler and purer judges than Jay and Ellsworth, Marshall, Taney, and Chase. The labors of Marshall and Taney, covering so many years of service, do, more and more, as time rolls on, command the admiration of the profession and of the country. Chief Justice Chase's term was so brief that the lawyer readily remembers the few judgments which he pronounced.

The ability of these judgments, the full knowledge which they display, and the admirable judicial style in which they were rendered, filled the professional mind not only with admiration, but with wonder. For many years he had ceased to practice the profession, devoting himself almost exclusively to the political contests of the day. His immediate labors before his elevation to the bench were, it is true, excessively arduous and evinced the greatest ability, but they bore little or no analogy to the subjects which he had to treat when he became the head of the tribunal. It was surprising, therefore, that at the very threshold of his duties, he exhibited a knowledge entirely adequate to their able and satisfactory discharge. The occasion will not permit me to refer particularly to any of his opinions, but I know you will not think me going too far when I say that, judging him by those opinions, he proved himself in all respects the equal of the great men who preceded him; and that his uniform kindness and courtesy to all the members of the profession commanded their esteem and regard.

I know that I may be pardoned for saying a word or two more. If leaving him as a judge, we refer to his private life, we find him every way worthy of commendation. As a friend, he was constant and sincere; as a parent, watchful and affectionate; and no persons will feel his loss more deeply than his immediate friends and his domestic circle. Their consolation is to be found in the exalted opinion entertained of him by all classes of his countrymen; and, above all, in the assurance that he died as he had lived, a Christian.

A committee was now named by the chairman, on motion, to draft suitable resolutions: Mr. CARLISLE being named as chairman of the committee. The committee having withdrawn, reported, after a short absence, the following resolutions, which were adopted:

SALMON PORTLAND CHASE, sixth Chief Justice of the United States, having departed this life since the last term of this court, the members of the bar and other officers of the court have assembled to testify their profound regret at the event and their high respect for his memory:

His opinions and judgments, as they are preserved in the official reports of the decisions of the court, attest his great ability and his devotion to the

duties of his high office. His long and distinguished career as a Senator and statesman, and the manner in which he conducted the important department of finance at a period of vital national importance are more appropriate to be commemorated elsewhere. It is as a judge only that we now recall him. The dignity which descended upon him from his illustrious predecessors lost nothing in his hands. His refined and cultivated mind, his unvarying courtesy, and his regard for the rights and feelings of others won the warm regard and attachment of all who came in contact with him, and the esteem, admiration, and respect of the bar continually and steadily increased during the eight years in which he presided over the deliberations of this high tribunal; therefore,

Resolved, That the members of the bar and officers of the court sincerely deplore the death of the late Chief Justice Salmon Portland Chase, and will affectionately preserve the memory of his many virtues and high qualities, and will wear the usual badge of mourning during the term.

Resolved, That the Attorney-General of the United States be requested to move the court to direct these proceedings to be entered upon the minutes, and that a copy thereof be transmitted to the family of the deceased Chief Justice, with the respectful assurance of the sincere sympathy of the members of this meeting.

At the opening of the court on Thursday, October 23d, Mr. ATTORNEY-GENERAL WILLIAMS presented the resolutions, and made the following remarks:

May it please the court, I have been charged with the sad duty of formally announcing to your honors the death of Chief Justice Chase, and of presenting, to be spread upon the records of the court, the resolutions of the bar touching that mournful event.

On the first day of last May, by the adjournment of this court for the term, he laid aside his official robes to seek that temporary repose which his arduous labors and bodily infirmities seemed to require, but in a few days thereafter, to the great disappointment and grief of his family and friends, he laid aside all that was mortal of his nature and passed to where the weary are forever at rest. While spring was revealing its new and beautiful forms of life upon earth, he was carried in the gentle arms of hope and faith to the new life of another world. To recount the public incidents of his eventful career upon this occasion would be to repeat what is as familiar as household words to the people of this country.

Suffice it to say, that as the governor of a great State, as a Senator in Congress, as a Secretary of the Treasury, and as Chief Justice of the Supreme Court, he was distinguished for great abilities and great devotion to duty. Conspicuous among his many claims to popular and lasting regard were his early, continued, and effectual labors for the universal freedom of man. His fame in this respect will be as enduring as the love of liberty in the hearts of the American people. To say that he administered the finances of the country through the late war of the rebellion, is enough to establish his pre-eminence and show his title to a nation's gratitude. Jay, Rutledge, Ellsworth, Marshall, and Taney, are the few imperishable names of the

great departed who have filled the chief seat in this court, and to those is now added, with new lustre to the galaxy, the name of Chase.

Posterity will know of him through his public services, but we his associates and friends, know and can appreciate as well his private virtues.

All the influences of his example were for good. He was above reproach in his relations to society. His physical proportions were in harmony with his high intellectual qualities. He was dignified and graceful in his deportment, and especially kind and courteous to members of the bar. His writings are remarkable for their clearness and force, and all who knew him know how instructive and charming he was in conversation. Physically, intellectually, and morally, he was all that a Chief Justice ought to be. Impelled by what has been called the infirmity of noble minds, he pursued with untiring zeal his lofty aims, and whatever else may be said of his aspirations, happily no one can say that they marred the excellence or purity of his personal character. Early in life he emigrated from New Hampshire, where he was born in 1808, and soon after became a citizen of Ohio, where, unaided by fortune or friends, he commenced his successful public career. Inspired by an ardor that spurned all obstacles he pressed onward and upward until he was exalted to the head of this high tribunal, a place that but few men can ever attain. Thence he has come down to his grave crowned with years and many honors. He leaves to his children and his country the record of a life—

> Rich in the world's opinion and men's praise,
> And full of all we could desire, but days.

To which Mr. Justice CLIFFORD, the Senior Associate Justice in commission, responded in behalf of the court as follows:

GENTLEMEN OF THE BAR:

Providence has ordained that man must die, and it is matter of solemn import to every reflecting mind that the sentence applies to the whole human family, without regard to station, attainment, or usefulness.

None of those who occupied these seats sixteen years ago are now here to participate in these commemorative proceedings, and only two of the number then in office survive to join in the general sorrow, so well expressed in the resolutions of the bar, for the great loss which the country has sustained by the death of the late Chief Justice of this court. Vacancy followed vacancy subsequent to that period, until the place of the Chief Justice and those of his associates were all filled by new appointments, and the junior of the immediately succeeding period, who was appointed to fill a prior vacancy, has become the senior Associate Justice of the court.

Great events in the meantime have occurred. State after State seceded, and the rebellion came and was crushed. Slavery

was abolished, and amendments were made to the Constitution to make it conform to that great change in the social relations of the States affected by the event. New laws were passed extending the jurisdiction of the court and vastly augmenting its labors and responsibilities.

Gratitude is due to Providence that the lives and health of the present members of the court have been preserved throughout that period and for the success which has attended their efforts, aided by the wise counsels of the late Chief Justice, in upholding all the safeguards of liberty ordained in the Constitution. Civil war raged for a time with all its demoralizing influences, but the court continued calm and unswerved, and the Constitution remains unimpaired to shed its benign influences upon the whole people of the country and to secure the blessings of liberty to the present generation and to their posterity.

Death has now again entered these walls, and, for a second time within the period mentioned, has removed the Chief Justice of the court. Such a loss is deeply felt by the whole country, and by none more heavily than by those connected with this tribunal. Whenever a good man dies, in any walk of life, there group around him in his last repose a mourning throng of sad regrets from the hearts of all who may have either experienced or witnessed his beneficence. But when, from some dignified and elevated station of public trust, obedient to the inevitable summons, a great and good man drops suddenly and noiselessly away, in the comprehensive sphere of whose high duties nothing remains but the solemn and suggestive silence of vacancy, a people's grief surrounds the grave to do justice to his motives and to award their saddened and affectionate approbation of his official services and public acts.

Difference of opinion, envy, or jealousy may have created barriers to a just appreciation of such a man during the active and angry struggles of life, but when the curtain of death interposes its impenetrable mystery between him and the living, that involuntary homage which human nature instinctively pays to its true noblemen, is almost always sufficient to hush such influences and override every such barrier.

Passions of the kind cloud the understanding and too often prevent any impartial judgment upon the life and character of a contemporary until the brief contentions of the world are left behind him and he has passed that solemn portal towards which

all human life is only the pathway. Influences of the kind sometimes affect even the public judgment and compel men at last to exclaim, "Our blessings brighten as they take their flight." Whether good or bad, the public man to whom, under a government of the structure of ours, has been committed the sacred duty of high public office, can ask no more, nor can his friends, than that those who desire to review his acts shall be governed by the inflexible standard of justice, looking to his motives and purposes as embodied in his acts, when properly construed in the light of the circumstances of his life and the nature, difficulty, and peril of his public duty.

Without a thought of anything so invidious as a comparison of merit, it may be safely said that of all the characters who were chief and prominent amid the swift and terrible commotions from which our country has little more than just emerged, none bore a more perplexing and onerous share of the public duty than the man to whose memory, more especially as its Chief Justice, the supreme judicial tribunal of the nation now pays its sad tribute of mourning and respect.

Called to preside over the administration of the national finance at a most alarming and painful period, when the past systems were manifestly inadequate to the enormous and unprecedented strain upon their resources, the energies of a comprehensive and creative mind were demanded to wield and shape the available wealth of the nation into such a channel that it should, to the largest extent possible, promote the development of the military and naval power of the country and give it the most efficient and direct support. Manifold difficulties attended the undertaking as the vital forces of the nation were suddenly wrenched from their accustomed pursuits of peace and were assembled at the call of the government, in the tumultuous arena of civil war, the immediate effect of which was to diminish very largely the ordinary national income and to increase fearfully the national expenditure. Immediate decision was indispensable, as the emergency would admit of no delay, and the requirement was not only that the reserved wealth of the nation should be evoked to meet the public emergency, but that it should be fused and melted into a current form.

With such demands upon the position our lamented brother was called to the office of Secretary of the National Treasury, not to administer a settled and tried system, but in the rapid

whirl and rush of swiftly succeeding events to devise one that was new and commensurate with the public exigency. Experiment may be tried in the hours of peace, and if experience fails to demonstrate the wisdom of the measure or exposes its imperfections, it may be abandoned or another may be substituted in its place without great injury to the government

Not thus, however, when Secretary Chase was summoned to the performance of the great duty under consideration, as a failure might have been irreparable. Certain success was required, and the result shows that the duty was assigned to a strong, sagacious, practical intellect, which readily apprehended the nation's capacity, and was able to grasp the national wealth with a firm hand and appropriate it to meet the stern and inexorable demands of the public emergency. Complete success followed, and it would seem to be a sufficient commentary upon the usefulness of any man to be able to say of him, that under such momentous and inflexible conditions he could and did devise a system of finance which was commensurate with the unexampled demands upon the national treasury.

Wide differences of opinion exist as to the wisdom of the system as a permanent one, but this is not the occasion for a discussion of the system, nor is such an examination necessary to a correct view of the mental and moral condition of its author, as it is rather from the survey of a long and earnest life of public service and the diversity of the labors to which his powers of mind were so nobly and successfully devoted that the inquirer is enabled to draw the most correct conclusions concerning his worth and capacity.

Superior fitness for a particular station is frequently the result of experience in the performance of the same or similar duties, and the mistakes resulting from the want of such qualifications have proved that they can hardly be too highly estimated, but we know that there are some few in every generation to whom are vouchsafed an intellectual elevation that enables the possessor almost instinctively to comprehend many of the perplexities of life, for the unravelling of which by others must be paid the hard tuition of patient toil and study and long investigation. Sagacity and forecast, when such gifts are possessed, supply to a large extent the usual demand for an acquaintance with the duties of the particular station or for an extended preliminary preparation for their performance.

Gifts of the kind in a high degree were possessed by the sub-

ject of these remarks, as shown throughout his public career as Governor of a great State, Senator in Congress, Secretary of the Treasury, and Chief Justice of this high tribunal. Mere versatility of mind could not have so honorably met the demands of these high positions. Success in so various and such important labors, without much opportunity for previous preparation, furnishes indubitable evidence of a strong and vigorous mind and a high order of intelligence, which enabled the possessor to analyze and comprehend many things with ease and facility, which a mind of lesser grasp would only have pushed further off with every attempt to encompass and expound.

Opportunity for preparation in legal knowledge he did have in his early manhood. Prior to the time he entered public life he was engaged in the practice of the law, and became eminent in his profession, as sufficiently appears in the volumes of the published decisions of this court; and he was eminent as the Governor of his adopted State, and as a Senator in Congress before he was called to preside over the national treasury, until it may be said, if the period of eight years during which he was the Chief Justice of this court be included, that he has exemplified his greatness in almost every variety of trial which arises in civil life.

Difficult and untried questions were constantly arising during the early stages of the late rebellion, and none will deny the eminent usefulness of the Chief Justice in solving the difficulties, or call in question his sagacity or forecast in respect to the effect and termination of that unhappy conflict, as it is within the recollection of many that he was able to look beyond the mist of civil agitation, and even through the darker and more frightful cloud of civil war, and to see nearer and nearer every hour the approaching dawn of a day under whose light all those threatening aspects would be dispelled.

Difference of opinion cannot exist as to the variety or importance of his public services, but it is a mistake to suppose that purely intellectual efforts are in every case the unfailing index of the greatness of a man, or that they always furnish the correct means of estimating the value of his public services; as such efforts, though great, may be accompanied by such vices of heart and defects of disposition as greatly to lessen or even destroy their influence in such an estimate. Purity, impartiality, love of justice, and respect for public and private rights are essential elements of greatness in a public man, and in every

such respect the character of our deceased brother challenges our highest admiration. His respect for public and private rights is universally acknowledged, and neither envy nor malice ever called in question the purity of his life or his impartiality in the performance of his public duties.

Throughout his career as Governor, Senator in Congress, and Secretary of the Treasury, he always manifested a love of justice, and the same trait of disposition and character is evinced in all his judgments, whether rendered in this court or the Circuit Court. We all know with what diligence and patience he investigated litigated questions, and how willing he was to review or even to surrender his own opinion in order to be right at last.

Men find it easy to review others, but much more difficult to criticize and review their own acts, and yet that is the very summit to which the upright judge should always be striving. Judges sometimes surrender with reluctance a favorite opinion, even when condemnation confronts it at every turn, and they find it wellnigh impossible to yield it at all when it happens to harmonize with the popular voice or is gilded with the rays of successful experiment.

Pride of opinion at such a time is too apt to predominate over a love of justice, but it was exactly under such circumstances that the late Chief Justice was called upon to review as a judge one of the most striking and conspicuous of his acts as the guardian of the national treasury at a moment when the fate of the nation so much depended upon its correct administration.

Great success attended the financial scheme when it was adopted, and time had secured for it an extensive approval, as the war of the rebellion was victoriously ended and the national wealth was rapidly increasing. Circumstances better calculated to foster pride of opinion cannot well be imagined, but the Chief Justice, who had so creditably met the demands of duty in such a great variety of other responsible positions, did not hesitate to apply his best powers to the task of reviewing the measure in question, and finally recorded his opinion that it was not justified by the Constitution.

Judges and jurists may dissent from his final conclusion and hold, as a majority of the justices of this court do, that he was right as Secretary of the Treasury, but every generous mind, as it seems to me, should honor the candor and self-control which inspired and induced such action.

During the rebellion probably no one mind could have successfully met all the requirements of public duty which the exigency presented, as the country had a war to wage, a Union to preserve, and a Constitution and government of laws to uphold and maintain, for which purpose a conservative judgment in the judiciary was wellnigh as essential as the courage of the soldier, or the wisdom of the executive, or the patriotism and forecast of Congress. Heavy responsibilities rested upon all, and it was fortunate that the Supreme Court, throughout a large portion of that period, enjoyed the benefit of the wisdom and forecast of the late Chief Justice.

Defects he doubtless had, but he had a calm, composed mind, in whose placid depths the bewildering events of the national conflict were wisely and clearly reflected, and in most cases correctly exhibited to the otherwise perplexed comprehension of many other persons. Clearness, repose, and depth characterized his intellect. Few men were better able to analyze the events of that period as they occurred, and to foresee with more unerring accuracy their effect upon the future welfare of the country when the conflict should end; and it is to these rare, great attributes of mind that the inquirer must turn if he would understand how it was that he was able to discharge with such success the duties of Chief Justice after years of such diverse employment and without much opportunity of preparation, except what he acquired in those employments and in his early practice. Revered and conspicuous names had previously filled that station, but it may be said, without fear of contradiction, that our departed associate was a fit successor of Marshall and Taney.

Summoned, as he was, to the station of Chief Justice of this court from a life largely spent in the executive, legislative, and administrative departments of the public service, surprise may well be felt at his great success as a judge, especially in view of the events which transpired within the period he held the office, and of the great importance and exceptional character of the judicial duty he had to perform. Numerous cases presented for decision within that period involved questions of prize and the exposition of the law of nations or the application of the laws of war, and many others have respect to the rights, obligations, duties, and privileges of citizens, and it is for that reason as well as others that they will ever be regarded as of great value to the public as well as to the legal profession.

But it would be a great error to suppose that the Chief Justice entered upon his high office with partial qualifications for its important duties. On the contrary he brought to the office a profound and comprehensive mind, familiarized with almost every variety of public duty, and matured, strengthened, and developed by a long and most instructive experience. He was deeply versed in the great principles of jurisprudence, and upon his accession to the bench bent all the energies of his powerful mind to a mastery of the peculiarities and history of Federal judicial decision. His faculties were eminently adapted to the comprehension of legal science, and so readily did he solve controverted questions of private right that the principles of law and equity seemed almost inherent in his nature.

Appointed, as it were, by common consent, he seated himself easily and naturally in the chair of justice and gracefully answered every demand upon the station, whether it had respect to the dignity of the office or to the elevation of the individual character of the incumbent, or to his firmness, purity, or vigor of mind. From the first moment he drew the judicial robes around him he viewed all questions submitted to him as a judge in the calm atmosphere of the bench, and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people.

Throughout his judicial career he always maintained that dignity of carriage and that calm, noble, and unostentatious presence that uniformly characterized his manners and deportment in the social circle, and in his intercourse with his brethren his suggestions were always couched in friendly terms, and were never marred by severity or harshness. Even when disease had shattered his physical strength and written its effect in deep and haggard lines upon his countenance, it was unable to rob him of his accustomed air of grandeur, which was merely the outward expression of an elevated and noble nature. Disease, however, overpowered his strength and he has closed his life, rich in honor and highly rewarded by the affection and respect of his countrymen. He died with the armor of duty on, wearing the honors of a great and conscientious magistrate.

Since death was inevitable, the highest affection could scarcely desire a more fitting departure from the scenes of earth, as he had rounded an arduous and useful life with a period of eight years of most delicate and important service as Chief Justice of the Supreme Court of the nation, having accomplished a long,

consistent, and successful public career, and closed it with the honorable exercise of the highest attributes of the human judgment.

Difficulties at all times attend the responsibilities of the Chief Justice of this court, but it should be remembered that the subject of these remarks was called to that elevated station during the most stormy and angry period of our national history, and it is praise enough to be able to say that he met all those exigencies with a calm and conscientious sense of duty, and such, in my judgment, will be the verdict which the present generation will transmit to posterity; to which, permit me to add, that the justices of this court have lost a revered companion and the public a great magistrate and an upright public servant. Our loss is great, but the loss of his children and grandchildren is much greater, and to them we tender our sincere sympathies.

The court cordially concurs in the resolutions of the bar as presented by the Attorney-General, and direct that the resolutions, together with the proceedings of the bar and the remarks of the Attorney-General and of the court, be entered in the minutes; and the court, from respect to the memory of the deceased, stands

ADJOURNED UNTIL TO-MORROW AT TWELVE O'CLOCK.

DEATH OF MR. JUSTICE NELSON.

THE Honorable SAMUEL NELSON, late an Associate Justice of this court, who, on account of advanced age, retired from this bench on the 1st of December, 1872, departed this life at his residence in Cooperstown, New York, December the 14th, 1873, in the 82d year of his age. Upon receiving intelligence of his death, on the following day, this court, in consideration of his long association with it, and of his eminent public services, adjourned without transacting the ordinary public business.

GENERAL RULE.

AMENDMENT TO ORDER IN REFERENCE TO APPEALS FROM THE COURT OF CLAIMS.—RULE No. 1.

Strike out the whole of clause 2 of the rule, and insert in lieu thereof the following:

2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said acts, on which the court founds its judgment or decree. The finding of acts and conclusions of law to be certified to this court as a part of the record.

[Promulgated October 27th, 1873.]

TABLE OF CASES.

PAGE

Adams *v.* Burke, ... 453
Air-Line Railroad Company, Harwood *v.* 78
Allen *v.* Massey, ... 351
" *v.* United States, ... 207
Amoskeag Manufacturing Company *v.* United States, . 592
Atocha, *Ex parte*, ... 439
Averill *v.* Smith, ... 82

Bailey *v.* Railroad Company, ... 96
Baker, Williams *v.* 144
Baltimore and Ohio Railroad Company, United States *v.* . 322
Bank, Eldred *v.* 545
" *v.* Kennedy, ... 19
Barnes *v.* Railroad Companies, ... 294
Beale's Executrix, Hume *v.* 336
Beall Assignee, Harrell *v.* 590
Beggs, The Collector *v.* 182
Benson, Kibbe *v.* 624
Board of Public Works *v.* Columbia College, . . . 521
Bokee, Carlton *v.* 463
Boutwell, United States *v.* 604
Branson *v.* Wirth, ... 32
Brown, Railroad Company *v.* 445
Burke, Adams *v.* 453
Bynum et al., Olcott *v.* 44

Carlton *v.* Bokee, ... 463
Carpenter *v.* United States, ... 489
Cedar Rapids Railroad Co. *v.* Des Moines Navigation Co., 144
City Bank, Wilson *v.* 473
Collector, The, *v.* Beggs, ... 182
Columbia College, Board of Public Works *v.* . . . 521

PAGE
Conway *v.* Stannard, ... 398
Cooke, United States *v.* 168
Cordova *v.* Hood, ... 1
Cutner *v.* United States, ... 517

Daniel *v.* Whartenby, ... 639
Des Moines Navigation Co., Cedar Rapids Railroad Co. *v.* 144

Eldred *v.* Michigan Insurance Bank, ... 545
Emily Souder, The, ... 666
Ex parte Atocha, ... 439
" Warmouth, ... 64

Fort, Railroad Company *v.* 553
Foster, Goddard *v.* 123
Francisco, Life Insurance Company *v.* 672
Fuller, Railroad Company *v.* 560

Gardner, Reed *v.* 409
German Savings and Loan Society, Oulton *v.* 109
Goddard *v.* Foster, ... 123
Goodwin *v.* United States, ... 515

Harrell *v.* Beall, Assignee, ... 590
Harwood *v.* Railroad Company, ... 78
Heartt, Rodd *v.* 354
Henry, United States *v.* 405
Hickey, United States *v.* 9
Hoag, Assignee, Sawyer *v.* 610
Holden *v.* Joy, ... 211
Homestead Company *v.* Valley Railroad, ... 153
Hood, Cordova *v.* 1
Hope, The Star of, ... 651
Horn *v.* Lockhart et al., ... 570
Huidekopers, Stitt *v.* 384
Hume *v.* Beale's Executrix, ... 336
Huntington, Moore *v.* 417

Iowa Homestead Company *v.* Valley Railroad Company, . 153
Isham, United States *v.* 496

PAGE
Joseph et al., Miller *v.* 655
Joy, Holden *v.* 211
" Warner *v.* 253

Kennedy, Bank *v.* 19
Kibbe *v.* Benson, ... 624
Knode *v.* Williamson, ... 586
Koch, Ryan *v.* 19

Lalley, Marin *v.* 14
Lapene, United States *v.* 601
Lapeyre *v.* United States, ... 191
Lasere *v.* Rochereau, ... 437
Life Insurance Company *v.* Francisco, ... 672
Lockhart et al., Horn *v.* 570
Lockwood, Railroad Company *v.* 357

McCue, Packet Company *v.* 508
Magwire, Tyler *v.* 253
Manhattan Life Insurance Company *v.* Francisco, . . 672
Manufacturing Company *v.* United States, . . . 592
Marin *v.* Lalley, ... 14
Mason *v.* United States, ... 67
Massey, Allen *v.* 351
Merritt, The, ... 582
Michigan Insurance Bank, Eldred *v.* 545
Miller *v.* Joseph et al., ... 655
Missouri, Rea *v.* 532
Moore *v.* Huntington, ... 417
Murray *v.* The United States (The Merritt), . . . 582

Nock, Philp et al. *v.* 460
Nuestra Señora de Regla, The, ... 29

Olcott *v.* Bynum et al., ... 44
Oulton *v.* Savings Institution, ... 109

Packet Company *v.* McCue, ... 508
Paul *v.* Shoemaker, ... 630
Philp et al. *v.* Nock, ... 460
Public Works, Board of, *v.* Columbia College, . . . 521

PAGE

Railroad Company, Bailey *v.* 96
" " Barnes *v.* 294
" " *v.* Brown, ... 445
" " *v.* Fort, ... 553
" " *v.* Fuller, ... 560
" " Harwood *v.* 78
" " Homestead Company *v.* . . . 153
" " *v.* Lockwood, ... 357
" " *v.* Stout, ... 657
" " United States *v.* 322
Ray *v.* Smith, ... 411
Rea *v.* Missouri, ... 532
Reed *v.* Gardner, ... 409
Rochereau, Lasere *v.* 437
Rodd *v.* Heartt, ... 354
Ryan *v.* Koch, ... 19

Savings Institution, Oulton *v.* 109
Sawyer *v.* Hoag, Assignee, ... 610
Shoemaker, Smiths *v.* 630
Smith, Averill *v.* 82
" Ray *v.* 411
" *v.* Shoemaker, ... 630
Sohn *v.* Waterson, ... 596
Souder, The Emily, ... 666
South Carolina, State of, *ex relatione* *v.* Stoll, . . . 425
Stannard, Conway *v.* 398
Star of Hope, The, ... 651
State *v.* Stoll, ... 425
State Harbor Commissioners, The, Walker *v.* . . . 648
Stevenson *v.* Beggs, ... 182
Stitt *v.* Huidekopers, ... 384
Stoll, State *v.* 425
Stout, Railroad Company *v.* 657
Sweeny *v.* United States, ... 75

The Collector *v.* Beggs, ... 182
" Emily Souder, ... 666
" Merritt, ... 582
" Nuestra Señora de Regla, ... 29
" Star of Hope, ... 651

PAGE

The State Harbor Commissioners, Walker *v.* . . . 648
Tyler *v.* Magwire, ... 253

United States, Allen *v.* 207
" " *v.* Boutwell, ... 604
" " Carpenter *v.* 489
" " *v.* Cooke, ... 168
" " Cutner *v.* 517
" " Goodwin *v.* 515
" " *v.* Henry, ... 405
" " *v.* Hickey, ... 9
" " *v.* Isham, ... 496
" " *v.* Lapene, ... 601
" " Lapeyre *v.* 191
" " Manufacturing Company *v.* . . . 592
" " Mason *v.* 67
" " Murray *v.* (The Merritt), ... 582
" " *v.* Railroad Company, ... 322
" " Sweeny *v.* 75

Valley Railroad, Homestead Company *v.* 153

Walker *v.* The State Harbor Commissioners, . . . 648
Warmouth, *Ex parte*, ... 64
Warner *v.* Joy, ... 253
Washington, Alexandria, and Georgetown Railroad Company *v.* Brown, ... 445
Waterson, Sohn *v.* 596
Whartenby, Daniel *v.* 639
Williams *v.* Baker, ... 144
Williamson, Knode *v.* 586
Wilson *v.* City Bank, ... 473
Wirth, Branson *v.* 32

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1872, AND OCTOBER TERM, 1873.

CORDOVA *v.* HOOD.

1. Where a deed of land shows on its face that the consideration is yet "to be paid," a second purchaser (that is to say, a purchaser from the vendee), who has notice of the deed, takes the land in those States (of which Texas is one) where the English chancery doctrine of a vendor's lien prevails, subject to the vendor's lien, unless such lien has been in some way waived.
2. In the case of such a deed it is the duty of the new purchaser to inquire; and where inquiry is a duty, the party bound to make inquiry is affected with all the knowledge which he would have got had he inquired.
3. Though it is true that taking a note with a surety from the vendee is generally evidence of an intention to rely exclusively upon the personal security taken, and therefore, presumptively, is an abandonment or waiver of a lien, yet this raises only a presumption, and as a presumption only it may be rebutted by evidence that such was not the intention of the parties.
4. The testimony of the vendor received to rebut, and being positive, held sufficient to do so.
5. Where a vendor already has a lien, evidenced by a note for the payment of all and every part of the purchase-money so long as it remains unpaid, the lien for any purchase-money afterwards still unpaid is not lost by the fact of his receiving part payment of the note before its maturity, taking a new note payable at the same time and in the same way and place as the original note, and a destruction of such original one.
6. By the laws of Texas (which in a matter connected with real estate was respected by this court in a suit coming from Texas) an assignment of a note given for the purchase-money of real estate carries the vendor's lien.

APPEAL from the Circuit Court for the Western District of Texas, on a decree dismissing a bill filed to enforce a vendor's lien. The case was thus:

On the 4th of March, 1859, B. G. Shields, by instrument of

writing, "bargained and sold to G. M. Hood" (both parties being of Texas) a tract of land in that State, described, "for the sum of $27,000, *to be paid* by the said Hood as follows." Certain drafts and notes to be given by Hood were then specified; among the notes one for $9000, payable at the Union Bank, New Orleans, April 9th, 1862. The deed ended with a covenant that "*on the completion of the payments before mentioned*" Shields would warrant and defend the premises to Hood, his heirs and assigns, against all persons lawfully claiming or to claim them. In point of fact, when the papers came to be executed, the notes were signed not only by Hood, the purchaser, but also by his son, G. M. Hood, Jr. On the 1st of April, 1862, before the note that became due on the 9th matured, Hood, Sr., called on Shields and stated to him that he had some surplus cash with which he desired to pay a part of it off. Shields accordingly took his money, and a new note was executed for the balance; the old note being given up. The new note, like the old one had been, was made payable April 9th, 1862, and at the Union Bank, New Orleans. This new note Shields afterwards (in the autumn of 1862) assigned to one Bartlett.

In May, 1863, Hood sold the land to two persons, named Scroggin and Hanna; and Bartlett having become bankrupt, his assignee in bankruptcy, one Cordova, now filed a bill in the court below against both the Hoods, Scroggin, and Hanna, to enforce the lien. The bill did not allege that the complainant had exhausted his remedy at law against Hood, the vendee of the land, who, or whose estate in point of fact, appeared to be solvent.

The Hoods let a decree pass *pro confesso*. Scroggin and Hanna set up in answer, or in argument, that all vendor's lien had been waived by taking Hood, Jr., as a party, who, not being interested, was a surety on the notes; that even if any lien had existed under or by virtue of the note of $9000, such lien was waived when that note was *paid*, as in law it was completely when it was surrendered; the transaction having been not a credit on an old debt, of so much cash paid, but an acceptance of cash and of a new

debt, accompanied by an annihilation and extinction of the old one; that, at any rate, however all this might be as between Shields and Hood, they, Scroggin and Hanna, were purchasers, *bonâ fide* and without notice of any lien; that further, if Shields, the vendor, might himself have enforced a lien against the land, had he continued to hold the note and debt, the right of enforcement was a right personal to him, and that it did not pass to Bartlett, his assignee, and as little certainly to Cordova, assignee in a second remove.

Shields, who was examined, thus testified:

"The recital in the instrument executed to G. M. Hood, Sr., on the 4th of March, 1850, corresponds with the facts, except that the name of G. M. Hood, Jr., was also signed to the notes. The land was sold to Mr. Hood, Sr., and his responsibility, coupled with a vendor's lien, secured by the regular form and terms of the instrument, was deemed by me a sufficient security. Mr. Hood, Jr., accompanied his father to my house, and was represented by his father to be his agent. I do not remember why it was that Mr. Hood, Jr.'s, name was signed to the notes. The deed or instrument was prepared, to the best of my recollection, before the notes, and in the absence of Mr. Hood; the notes, after the arrival of Mr. Hood and son. Their joint signatures was probably a suggestion of the moment and did not alter or take from the facts recited in the instrument. Mr. Hood, Sr., did execute the notes to secure the payment of the amounts, and at the time, and for the considerations mentioned in the deed. The additional signature of Hood, Jr., was simply that much more; a gratuity not called for by nor altering the contract. Mr. Hood, Sr., was represented, by those who knew him in Eastern Texas, to be a wealthy man. His son was considered responsible and trustworthy as far as I know. The reason for not taking a mortgage is shown by the terms of the instrument, by which the vendor's lien is plainly retained and held. I have no recollection of who was present when the terms of the instrument securing the vendor's lien were discussed, if discussed at all. There never was any question between us on that point; it being considered, of course, that my obligation of warranty in the instrument would only be made perfect or complete upon the payment of the whole amount of the purchase-money.

Statement of the case.

"The payment of a portion of the note of $9000 in advance, and taking another note, was simply a matter of convenience, and not intended, in any manner, or to any extent whatever, to impair or affect the lien retained by the terms of the instrument to secure the payment of the whole amount of the purchase-money. It was positively and unequivocally so stipulated and agreed between us at the time of the execution of the said note of $5015; so stated and understood, without question, between us.

"The note was traded to Bartlett, with the statement from me that it was secured by a vendor's lien on the land sold to Hood, Sr. I will further state that I believed at the time that Mr. Bartlett had special reference to that fact in the transaction, and that he felt that the note of G. M. Hood, Sr., to secure the remainder of the last payment for the land, with the right of the vendor's lien upon said land, was safer for him (Bartlett) than cotton, which he gave me for it; then liable at any moment to impressment.

"Both Hanna and Scroggin spoke to me, some time since—perhaps 1868 or 1869—in reference to the terms of sale by me to Hood. I gave them such information as my recollection of the facts warranted. One of them, and perhaps both, stated that they had been informed by Mr. Hood that he had paid the whole amount of the purchase-money; in reply to which I gave them true information, as nearly as I could. At the time there was more than $9000 due."

Bartlett was also examined. He said:

"When Shields sold the note to me, he told me distinctly and positively that it was secured by a lien on the land. This was perfectly understood between us. I relied on this lien when I purchased it."

Scroggin and Hanna were also both examined. They testified that Hood, Sr., was one of the wealthy men in Texas; that they supposed that the land had been sold to him on his personal responsibility; that with his own lips he declared to them that every dollar was paid on the land; that they had never heard of any lien. It appeared, however, on cross-examination that they had seen the record of the deed of March 4th, 1859, from Shields to Hood, before purchasing

from Hood, and had had it examined by their professional adviser for their own "protection."

The court below confirmed the decree so far as the bill was confessed, but dismissed it as against Scroggin and Hanna. From that decree Cordova took this appeal.

Messrs. Conway Robinson, W. G. Hale, and R. T. Merrick, for the appellants; Mr. G. F. Moore, contra.

Mr. Justice STRONG delivered the opinion of the court.

The appellees must be held to have had notice of whatever equities were revealed in the line of their title. They claim through a conveyance from Hood, Sr., who had purchased from Shields in 1859, and the deed from Shields plainly exhibited the fact that the purchase-money remained to be paid. It contained not even a receipt for the consideration of the sale. In form it was a deed of bargain and sale, but there was not enough in it to show that the use was executed in the vendee. On the contrary, it recites a consideration "*to be paid*" in instalments at subsequent dates, for which a draft and notes were given. That the vendor, by such a deed, had a lien for the unpaid purchase-money, as against the vendee and those holding under him with notice, unless the lien was waived, is the recognized doctrine of English chancery, and Texas is one of the States in which the doctrine has been adopted.* It is a general principle that a vendor of land, though he has made an absolute conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase-money, unless there has been an express or an implied waiver of it. And this lien will be enforced in equity against the vendee and all persons holding under him, except *bonâ fide* purchasers, without notice.† With greater reason, it would seem, should such a lien exist and be enforced when, as in this case, the deed,

* Osborn v. Cummings, 4 Texas, 13; Neel v. Prickett, 12 Id. 188; Briscoe v. Bronaugh, 1 Id. 326.

† Mackreth v. Symmons, 15 Vesey, 329.

instead of containing a receipt for the purchase-money, expressly states that it remains unpaid.

The important question to be considered, therefore, is whether the lien has been waived. That there was no express waiver by Shields at the time when his deed to Hood was made and delivered, or at any subsequent time, is not only not proved, but is plainly disproved. Shields himself has testified that the lien was never released by him, and that when the note of his vendee for $5015 was taken for the unpaid portion of the larger note given at the time of the sale, it was with the distinct understanding between him and Hood that the payment then made, and the execution of the note for the balance, made no difference whatever respecting the vendor's lien to secure the balance, but "that the land should continue just as liable to secure payment of said balance as before."

It remains then to inquire whether there was any implied waiver of a lien. When the deed was made the vendor took for the purchase-money promissory notes signed not only by Hood, the vendee, but by Hood, Jr., his son. Had the notes been signed by the vendee alone no implication of an intent to waive a vendor's lien could have arisen. It is everywhere ruled that where such a lien is recognized at all it is not affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or his check, if not presented or if unpaid, or any instrument involving merely his personal liability.* It is true that, taking a note or a bond from the vendee with a surety, has generally been held evidence of an intention to rely exclusively upon the personal security taken, and therefore, presumptively, to be an abandonment or waiver of a lien. But this raises only a presumption, open to rebuttal by evidence that such was not the intention of the parties.† And we

* See numerous cases collected in note 1, Leading Cases in Equity, Hare & Wallace, 235, under the case of Mackreth v. Symmons.

† Campbell v. Baldwin, 2 Humphreys, 248, 258; Marshall v. Christmas, 3 Id. 616; Mims v. Railroad Co., 3 Kelley, 333; Griffin v Blanchar, 17 California, 70; Parker v. Sewell, 24 Texas, 238; Dibblee v. Mitchell, 15 Indiana, 435.

think the evidence in this case clearly shows that neither party to the deed understood that the vendor intended to take the note of Hood, Sr., and Hood, Jr., as a substitute for the lien. The only evidence we have bearing directly upon the subject is in the testimony of Shields. To some extent he does undoubtedly confound his own impressions with what occurred when the notes were given. But we think it may fairly be deduced from his statements that there was no intention then to waive the lien, which the law implied from the terms of the deed. He is unable to state why the son's name was signed in conjunction with the father's, but he is positive that the additional signature was simply a gratuity not called for by the contract nor altering it. He states also there never was any question between himself and his vendee respecting a vendor's lien, adding, it being considered, of course, that his obligation of warranty in the deed would only be made perfect or complete upon the payment of the whole amount of the purchase-money. And that taking the notes as they were taken was not intended as a waiver of a vendor's lien, or at least that it was not understood by the vendee to be such a waiver, is placed beyond doubt by what took place afterwards, on the 1st of April, 1860. There the renewed note was given for a part of the original purchase-money, and it "was positively and unequivocally stipulated and agreed by the vendor and vendee" that the original lien was retained, that the land should continue liable as before. How could this be, if the lien had been waived? Waiver is a thing of intention as well as of action, and it is impossible to believe, in view of this testimony, there was an intention to give up the security of the land. Were this a bill to enforce the lien against the lands in the hands of Hood, the purchaser, it would not be permitted to him to assert that the vendor had, from the first, relied only upon the personal security taken.

And Scroggin and Hanna, the purchasers from Hood, are in no better position. They are not *bonâ fide* purchasers without notice. As we have seen, the lien for the purchase-

money was apparent in the line of their title. The deed from Shields to Hood informed them that the consideration was unpaid. It imposed upon them the duty of inquiring whether it remained unpaid when they were about to make their purchase.* Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. Had inquiry been made of the vendor, it would easily have been ascertained that a portion of the purchase-money remained unpaid. Inquiry of Hood, the debtor, if any such inquiry was made, was an idle ceremony. The deed pointed to the person from whom purchasers from Hood were bound to seek information.

It has been suggested in the argument on behalf of the appellees, that taking up the original note, and giving another note for an unpaid balance of the first, may have terminated the lien if any existed. Undoubtedly no agreement made in 1860, when the new note was given, created a vendor's lien for its security. But the original lien was for all the purchase-money, and for every part of it so long as it remained unpaid. It was not merely security for the notes first given; it was for the debt of which the notes were evidence. Giving the new note was not payment of the debt, it was only a change of the evidence, and, therefore, the fact that it was given did not affect the lien. In *Mims* v. *Lockett*,† it was held that if a vendor of land takes a note for the price, and subsequently renews it, adding in the new note a sum of money due him by the vendee on a different account, his vendor's lien will not be invalidated thereby.

It has been further argued that even if Shields, the vendor, might have enforced a lien against the land had he continued to hold the note, Bartlett, his assignee, cannot. It is contended that a vendor's lien is a personal right of the vendor himself, not assignable. And hence that the assignee of a note given for the purchase-money cannot resort in equity

* McAlpine v. Burnett, 23 Texas, 649. † 23 Georgia, 287.

to the land sold. It must be admitted that such is the doctrine of very many cases, perhaps of those which have been best considered, though there are many well-reasoned judgments to the contrary. But we think, for the purposes of the present case, the law, as held by the Supreme Court of Texas, must furnish the rule of decision. And the decisions of that court appear to be that an assignment of the notes given for purchase-money carries with it the lien to the assignee.*

It has been held that in order to enforce a vendor's lien, the bill must show that the complainant has exhausted his remedy at law against the personal estate of the vendee, or must show that he cannot have an adequate remedy at law. And this bill makes no such showing. But in Texas, as in some other States, the creditor may proceed in the first instance to enforce the lien in equity.†

Upon the whole, then, we think the Circuit Court erred in dismissing the complainant's bill. He was entitled to a decree.

DECREE REVERSED, and the case remitted with instructions to enter a decree for the complainant against Scroggin and Hanna, the appellees and defendants below.

UNITED STATES v. HICKEY.

1. When the Court of Claims, on a claim embracing several items, rejects some but allows others, against which allowance the United States *alone* appeals, this court will not give consideration to the items rejected and against whose rejection the claimant has not appealed, except so far as may be necessary for a proper understanding of the item allowed.
2. Where a lessee, after letting to another, reserving a rent, has assigned all his "right, title, and interest" in the lease, and "authorized the assignee to sue for, collect, and recover the lease, and the rights to the rent reserved under the same," declaring "it to be distinctly under-

* Moore v. Raymond, 15 Texas, 554; Watt v. White, 33 Id. 425.

† McAlpine v. Burnett, 19 Texas, 497.

stood" that it is the object and purpose to put the assignee in his "place and stead, so far as concerns his rights under the lease"—the lessee, on a claim against him by the sub-tenant, cannot set up a claim for arrears of rent due to him at the time when he assigned the lease. The transfer has carried them to the assignee.

APPEAL from the Court of Claims; the case being thus:

In July, 1851, the Secretary of the Treasury, on behalf of the United States, agreed with one Eldredge, to lease from him certain warehouses in the city of San Francisco for the term of ten years. The rent for the first two years was fixed at $6000 per month, and it was agreed that at the expiration of every two years thereafter the secretary should have the privilege of having the rent fixed for the ensuing two years by a commission, of which the secretary should appoint one member, Eldredge another, and that the two thus selected should choose a third.

In February, 1856, the United States desiring to "get clear of this lease," the collector of the port of San Francisco, by authority of the Secretary of the Treasury, entered into an agreement with one Hickey, by which the United States leased to him the warehouses mentioned, *during the term* of the lease first mentioned. Hickey agreed to pay $500 per month until the 1st of May following (that is to say, till the 1st of May, 1856, at which time an appraisement was to be made as by the terms of the original lease), and to pay thereafter to the United States the sum which should be awarded to Eldredge for the two years ensuing, and after that time to pay such sum as should be awarded from time to time for the terms of two years thereafter ensuing:

"Provided, nevertheless, that the sum of $250 per calendar month is hereby saved and reserved to the said Hickey during the term of the aforesaid lease, as a bonus to him, . . . to be paid at the expiration of each month, . . . monthly until the completion of the same."

Under this agreement Hickey paid rent as agreed until May, 1856. He then appointed one person to appraise the

future rent. The secretary appointed another. They failed to agree, and failed to appoint an umpire; and the Secretary of the Treasury, although receiving notice of such failure, took no further steps in the matter.

On the 13th of April, 1857, difficulties and disputes having arisen between the government and Eldredge concerning the amount of rents lawfully demandable by Eldredge from the government, the secretary, without the knowledge of Hickey, entered into an agreement with Eldredge by which the United States transferred and assigned to him "all their right and title and interest in and to the said lease, and authorized him to sue for, collect, and recover the Hickey lease, and the rights to the rent reserved under the same," and agreed to pay him $110,000 in satisfaction of all future claims for rent under the original lease; this conveyance adding to its terms of assignment and transfer these words:

"It being distinctly understood that it is the object and purpose of this agreement to put the said Eldredge in the place and stead of the United States, so far as concerns the rights of the United States under the lease aforesaid."

In August of the same year Eldredge took proceedings in the courts of California against Hickey for non-payment of rent on the lease, and in November dispossessed him of the premises.

In this state of things Hickey filed a petition in the Court of Claims, in which he alleged that the United States were indebted to him upon three items:

1. His bonus of $250 per calendar month, reserved, and extending, as he alleged, through a term of six years, $18,000.

2. For damages in the breaking up of his business by the eviction, against which he asserted his right to be indemnified by the United States, $28,000.

3. For storage of goods belonging to the United States during the years 1856 and 1857, the sum of $1370. The claim was for storage while Hickey was in possession of the warehouses as above mentioned.

Against this last claim (which was not denied) the United States set up a counter-claim of $9000 for rent alleged to be due by Hickey, from May, 1856, to November, 1857 (when Hickey was evicted), on the lease made by them to him. No evidence was given of the monthly value of the premises.

The Court of Claims rejected Hickey's first and second claims; that is to say, his claims of bonus, and for damages, but allowed his claim for storage; *dis*allowing the counter-claim or set-off presented by the United States.

The United States *alone* appealed.

Mr. S. F. Phillips, Solicitor-General, for the appellants; Mr. J. W. Moore, contra.

Much of the argument was directed to the matter of the two items which were rejected by the Court of Claims; items not passed on by this court. On the remaining point, the refusal of the court below to allow the counter-claim of the United States, the Solicitor-General argued that the lease to Hickey was not a sub-lease, but a lease of the term (*i. e.*, of the entire term), from February 1st, 1856, to the end of the lease. This was a transfer of the whole interest of the United States in the lease, and of necessity therefore an *assignment* of the lease.

As a consequence of this, Hickey became bound to Eldredge for all rent that the United States, the lessee and assignor, had agreed to pay. Now the United States had agreed to pay $6000 a month, unless arbitrators appointed from time to time should say otherwise. And upon a consideration of the whole transaction, including the relations of Hickey as assignee to Eldredge, and thereupon indirectly to the United States, it seemed clear that Hickey's obligation by his contract with the United States was, that if there was no assessment upon the 1st of May, 1856, he would in effect take the place of the United States in their contract with Eldredge as regards the payment of the rent, receiving the *bonus* of $250 a month by way of diminution of his rent. But Hickey paid rent to no one after the 1st of May, 1856.

Upon the whole, the case was one in which the assignee of

a lessee, who is indebted to the original lessor for a large amount which the lessee has in fact paid, demanded that the lessee should pay him a debt much less than that already paid for him to the original lessor, and one, at that, growing out of the same transaction. The assignee of a lease in possession is to be regarded as the principal debtor for rent to the lessor, and the lessee as only secondary.

Mr. Justice HUNT delivered the opinion of the court.

By not appealing, the claimant has declared himself to be content with the disposition of the case by the Court of Claims. The appeal brings up only the claim allowed. The rejected items, therefore, will receive no consideration, except so far as may be necessary for a proper understanding of the item allowed.

It is said that the transaction with Hickey was an assignment to him by the United States, and not an underletting. It was not an assignment, as the terms between the United States and Hickey were different from those between Eldredge and the United States. The United States agreed to pay $6000 per month, and had a privilege of an appraisement at their option. Hickey agreed to pay $500 per month only for the first two months, was to have in substance a deduction of $250 for every month thereafter by the United States, and no rent after May 1st was fixed unless an appraisal should be made.* It is difficult, however, to see the importance of the difference in this proceeding, whether it was an assignment or subletting. The short answer to the counter-claim is that the United States had assigned to Eldredge all their claim and demand for the rent upon this lease, and therefore could have no claim against Hickey by virtue of it. The rent was paid by Hickey to May 1st, 1856. After that time he refused to pay rent, on the ground that there was no appraisal fixing the amount. No appraisal has ever been made. No evidence was given before the Court of Claims of the rental value of the premises, and I see not

* 2 Blackstone's Commentaries, 827, n.

how more than nominal value could in any event be claimed. But beyond this, the United States, on the 18th of April, 1857, transferred and assigned to Eldredge all their right, title, and interest in and to the lease, and authorized him to sue for and recover the rents reserved to the United States as fully as they could do. It was added, "it being distinctly understood that it is the object and purpose of this agreement to put the said Eldredge in the place and stead of the United States, so far as concerns the rights of the United States under the lease aforesaid." It was by virtue of the ownership of the lease acquired under this assignment that Eldredge took proceedings in the California courts, which resulted in the eviction and dispossession of Hickey from the premises described in the lease. This assignment, in the terms stated, carried all the interest in the rents already accrued as well as rents thereafter to accrue. It was broad and comprehensive, carrying every interest in or connected with or arising out of the lease. There was no claim or demand against Hickey existing in the United States under this lease, and consequently there was no counter-claim to be interposed against his demand for storage allowed by the judgment appealed from. The decision of the Court of Claims was right and must be

AFFIRMED.

MARIN v. LALLEY.

1. The order of seizure and sale called "executory process," made in Louisiana when the mortgage "imports a confession of judgment," is in substance a decree of foreclosure and sale, and therefore a "final decree;" especially when made after objections have been made and heard.
2. When a proceeding below is in its essential nature a foreclosure of a mortgage in chancery, an appeal is the only proper mode of bringing it here.

ON motion to dismiss an *appeal* from the Circuit Court for the District of Louisiana; the case being thus:

In Louisiana a mortgage creditor may apply to a judge at

chambers, or in court, upon non-payment of the mortgage debt, and obtain from him an order of seizure and sale, when the mortgage imports a confession of judgment. It is said to import such confession when the mortgage has been "passed before a notary public in the presence of two witnesses and the debtor has declared or acknowledged the debt for which the mortgage is given."* The order of seizure and sale, called executory process, is said to be issued as upon a judgment by confession.

The Code of Practice requires that three days' notice be given to the debtor;† and the judge is required to examine and "decide whether the instrument unites all the requisites of the law necessary to authorize this summary proceeding."‡

In this state of law Marin and others having passed to Lalley their mortgage, executed in the manner mentioned, Lalley, on the 28th of March, 1872, filed his petition in the Circuit Court of the United States, praying for executory process on it. Upon this petition an order was made thus:

"ORDER.

"Let executory process issue as prayed for, and according to law.

W. B. WOODS,
"Judge.

"March 28th, 1872."

On the 4th of April, 1872, a petition for writ of error was granted to operate as a supersedeas, and a writ of error, bond and citation, were issued and served accordingly.

On the 11th of April the defendants filed their objection to the order for executory process and prayed that the same be quashed.

On the 16th of April, "the cause coming on for hearing *on the opposition and answer of the defendants to the order for*

* Code of Practice, art. 733, p. 304; Harrod v. Voorhies's Administratrix, 16 Louisiana, 256.

† Code of Practice, art. 735, p. 304.

‡ Harrod v. Voorhies's Administratrix, 16 Louisiana, 256.

executory process, herein granted on the 28th day of March, 1872, and on the application therein to quash the writ of seizure and sale"—it was ordered "that the writ of seizure and sale be quashed as prematurely issued, that opposition be dismissed, and that the order of 28th of March, 1872, be now made final." An order was then entered, that the writ of error originally filed, and which was set aside on the 16th day of April, be now reinstated to operate as a supersedeas, and that the said order setting "aside the said writ be cancelled and annulled."

A rule was then taken by the petitioner, for reasons stated, to set aside and annul the reinstatement of this writ of error and the supersedeas.

On the 8th of May it was ordered "that all decrees herein made, subsequent to the last order granted by the presiding judge be vacated and rescinded, leaving to the parties their remedy, if they see fit to do so, to file a bill on the equity side of the court and apply for an injunction upon good cause shown."

Another opposition to the seizure and sale was filed on the 9th of May, and in this involved condition of the case it was ordered, on the 10th of May, by the district judge, "that the matter be submitted to his honor, *the circuit judge*."

On the 25th of May the circuit judge ordered "that the said opposition be dropped from the docket," and on the 3d of June he ordered "that the objections and answers of the defendants to the order and seizure of sale be overruled."

On the 13th of June the defendants prayed for an *appeal* "from the order for executory process, 28th of March, 1872, and made final on the 3d of June, to operate as a supersedeas upon giving bond for costs and all just damages for delay only."

Whereupon it was ordered by the district judge that an *appeal* be granted to operate as a supersedeas, and that said *appeal* be made returnable to the Supreme Court on the first Monday of December, 1872.

A bond was approved and filed in the penalty of $1000, conditioned to pay such damages and costs as may accrue

in case it should be determined that "the said appeal was wrongfully obtained."

The citation, dated the 14th June, summons the party to appear pursuant to a motion for appeal.

Mr. P. Phillips, in support of the motion to dismiss:

1st. The order for executory process is not a "final judgment" which can be reviewed by writ of error.

2d. The proceeding being on the law side of the court an appeal does not lie, even if there were a final judgment.

The case of *Levy* v. *Fitzpatrick*,* decided in 1841, and which was a case coming from the same court as the present, shows that a writ of error will not lie on an order for executory process.

Mr. T. J. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

As the Code of Practice requires that three days' notice be given to the debtor, and the judge is required to examine and decide whether the instrument unites all the requisites of the law necessary to authorize this summary proceeding, his decision is a judgment or decree, and an appeal lies from it; for it may be erroneously made on evidence not warranting the issuing of the executory process.† It is in substance a decree of foreclosure and sale, which has repeatedly been held to be a final decree.‡

In the case before us it seems there was an appearance by the defendants, who filed their objections, which were overruled. Some further proceedings were had, and an appeal was allowed by this court to operate as a supersedeas.

If there were any doubt as to the finality of the original order, there can be none that it became final when the answer and objections were overruled. That order seems to

* 15 Peters, 167.

† Harrod v. Voorhies's Administratrix, 16 Louisiana, 256.

‡ Ray v. Law, 3 Cranch, 180; Whiting v. Bank of the United States, 13 Peters, 15; Bronson v. Railroad Co., 2 Black, 524.

have been made contradictorily with the debtors. Their opposition was overruled and their property decreed to be seized and sold to pay their debts.* This case is quite distinguishable from that of *Levy* v. *Fitzpatrick*.† In that case there was an order for executory process upon a mortgage where the debtors resided in different States, but having signed and acknowledged the mortgage, were presumed, according to the law of Louisiana, to be before the judge. This court would not entertain an appeal from a judgment rendered by the Circuit Court against any defendant who had not been actually served with process and had entered no appearance.

Incidentally, it is true, the court held the order not to be a final judgment according to the laws of Louisiana. But this was said of the original order, without the three days' notice and without any act on the part of the debtors.

In the present case the debtors appeared by their opposition, which was overruled and the original order made final. In such a case, the opinion of the court shows that the writ of error would have been sustained, apart from the objections growing out of the want of service of parties. We have held, however, in the case of *Walker* v. *Dreville*,‡ that no writ of error lies, where the proceeding below, in its essential nature, is a foreclosure of a mortgage in chancery. If this case had been brought here by writ of error, as the case of *Levy* v. *Fitzpatrick* was, it must have been dismissed. The only proper mode of bringing it here was by appeal.

From what has been said it follows that the motion in the present case must be

DENIED.

* Martin, J., dissenting, in Grant v. Walden, 6 Louisiana, 635.

† 15 Peters, 170.

‡ 12 Wallace, 440.

Syllabus.

RYAN v. KOCH.

A judgment affirmed because the plaintiff in error had filed no assignment of errors or brief, as required by the rules of court.

IN this case a writ of error to the Circuit Court of the United States for the District of Michigan (*Mr. J. G. Sutherland, for the plaintiff in error; Mr. G. T. Edmunds, contra*) had been filed on the 27th of November, 1871, but the plaintiff in error had filed no assignment of errors or brief as required by the rules of the court. And for those reasons (Mr. Justice CLIFFORD announcing the decision of the court) the judgment was

AFFIRMED.

BANK v. KENNEDY.

1. A receiver of a national bank, appointed by the comptroller of the currency under the 50th section of the National Banking Act, may sue for demands due the bank in his own name as receiver, or in the name of the bank.
2. A receiver, in order to sue for an ordinary debt due the bank, is not obliged to get an order of the comptroller of the currency. It is a part of his official duty to collect the assets.
3. The case of *Kennedy* v. *Gibson* (8 Wallace, 506), distinguished from this case; as having been a suit against the stockholders of the bank, which required the direction of the comptroller.
4. Conversations occurring during the negotiation of a loan, or other transaction, as well as the instruments given or received, being part of the *res gesta*, are competent evidence to show the nature of the transaction, and the parties for whose benefit it was made, where that fact is material. They are not adduced for the purpose of proving facts stated or affirmed in the conversations, but to prove the conversations themselves as facts; and are not hearsay, but original evidence.
5. Where the cashier of a bank effects a loan, and it becomes material to ascertain whether it was made for his own account or for the use of the bank, evidence of the negotiation and circumstances may be given for that purpose, whatever may be the form of the securities given or received, when the latter are introduced only collaterally in the cause.
6. When papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which they were made, and the reason why they were made in a particular form, may be explained by parol evidence.

General statement of the case.

7. The purpose or quality of an act may be stated by a witness who was present and cognizant of the whole transaction, as whether the delivery of money by one man to another was by way of payment or otherwise.
8. What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was induced by the conduct or declarations of the other party.
9. Evidence or statements of fact not contained in the bill of exceptions, nor made a part thereof, though appended thereto, will not be regarded by the court.

ERROR to the Supreme Court of the District of Columbia.

Kennedy, receiver of the Merchants' National Bank, brought suit in the court below against the National Bank of the Metropolis, to recover the balance alleged to be due on a check for $50,000, dated May 1st, 1866, drawn by one Robinson on the said Bank of the Metropolis, in favor of the said Merchants' Bank, and duly presented for payment. On presentation of the check the Bank of the Metropolis admitted its obligation to pay it, but as part payment thereof, delivered to the messenger of the Merchants' Bank a note of C. A. Sherman, cashier of that bank, for $20,000, dated February 27th, 1866. The Merchants' Bank declined to receive this note as payment, and sent it back demanding the cash. But the Bank of the Metropolis refused to take back the note, insisting that although it was signed by Sherman, individually, it was given for account of the Merchants' Bank, and for a loan made to *it*. The principal controversy in the case arose upon the question whether the note was given by Sherman on his own account or on account of the Merchants' Bank.

Certain preliminary questions, however, were raised with reference to the authority of the receiver to bring the action.

Verdict and judgment, under the rulings as to evidence, and under the charge, were given for the plaintiff; and the defendant, the Bank of the Metropolis, brought the case here. This court disposed of the different points raised, considering them in the order of the several assignments of error.

Messrs. Hubley Ashton and W. D. Davidge, for the plaintiffs in error; Messrs. R. T. and W. M. Merrick, contra.

Opinion of the court on the first and second errors assigned.

Mr. Justice BRADLEY delivered the opinion of the court.

The first and second errors assigned are that the plaintiff, who is a receiver appointed by the comptroller of the currency under the fiftieth section of the National Banking Law, is not entitled to bring suit without the authority or direction of the said comptroller—which is not alleged or shown in this case; and that the action cannot be maintained by the receiver in his own name as such.

These objections are based upon the language of the act referred to, as well as the general nature of the receiver's office. The statute* enacts:

"That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a *receiver*, and require of him such bond and security as he shall deem proper, who, *under the direction of the comptroller*, shall take possession of the books, records, and assets of every description of such association, *collect all debts, dues, and claims belonging to such association*, and upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller," &c.

We have already decided in the case of this very receiver that he may bring suit in his own name or use the name of the association.† The subject was also lately discussed in the case of *The Bank of Bethel* v. *The Pahquioque Bank*,‡ and the same views were held; the action in that case being brought against the insolvent bank. This disposes of the question as to the legal right of the receiver to sue.

It remains, therefore, to determine whether it is necessary

* Section 50, 13 Stat. at Large, 114.

† Kennedy v. Gibson, 8 Wallace, 506. ‡ 14 Wallace, 383

for the receiver, before bringing suit in an ordinary case of a debt or claim due the bank, to have the order of the comptroller for that purpose. In the case already referred to, the receiver had instituted a suit in equity against some of the stockholders of the bank for the purpose of charging them with the personal liability prescribed by the twelfth section of the act; and we held that he had no right to do this without the comptroller's direction. But it will be perceived that that was a very special case, out of the ordinary course, and one which involved an important consideration of the policy to be pursued. Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled to all the surplus that remains, if any should remain, after the payment of the debts. They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted, and they ought not to be prosecuted without due regard to the circumstances of the case. The determination on the part of those charged with winding up the affairs of the bank, to resort to this ultimate remedy, requires the exercise of due consideration; and a receiver ought not to take it upon himself to decide so important a question without reference to the comptroller under whose direction he acts. Although it is his duty to collect the assets of the institution he does not distribute them, and cannot ordinarily know, without reference to the comptroller, whether a prosecution of the stockholders will be necessary or not. Hence our decision in the case of *Kennedy* v. *Gibson* cannot fairly be quoted for the government of a case like the present, which is a suit to recover an ordinary debt.

The language of the statute authorizing the appointment of a receiver to act *under the direction of the comptroller*, means no more than that the receiver shall be *subject* to the direction of the comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no

Statement of the third error assigned.

special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver.

We next come to the special ground of litigation in this case.

The cause was tried before a jury, and evidence was adduced pro and con upon the principal subject of controversy, namely, whether the note given by Sherman to the defendants, on the 27th of February, was given on his individual account for a loan made to him personally, or whether it was given on the account of the Merchants' Bank (of which he was cashier) for a loan made to it. We are called upon to decide upon the legality of certain rulings as to evidence which took place during the trial, and upon the correctness of the charge to the jury.

After the plaintiff had proved the presentation of the check on the 1st of May, and the payment of it to the messenger of the Merchants' Bank, in certain moneys and securities, including the note in question; and had proved by Sherman, the cashier of the Merchants' Bank, that the defendants refused to take the note back and pay the cash instead; he proceeded to prove by Sherman the circumstances under which the note had been given to the defendants, the substance of which was, that on the 27th of February he applied to Hutchinson, cashier of the defendants, for a loan to himself of $20,000, to enable him to purchase some stock in the Merchants' Bank, and that this note was given for that loan, with the certificate of the stock attached as collateral; and that he received therefor two drafts for $10,000 each on Baltimore and Philadelphia banks, payable to C. A. Sherman, cashier; that he indorsed them as cashier, and that the proceeds, when paid, went to the credit of the Merchants' Bank. The drafts being produced in evidence, the plaintiff's counsel then asked the witness what took place, when the drafts were about to be drawn, between him and Hutchinson in

regard to the form of the drafts. This evidence was objected to, was allowed, and an exception taken, which is the subject of the third assignment of error.

It is argued by the counsel for plaintiffs in error that this evidence was calculated to explain or vary the legal effect of the drafts themselves. We do not think so. Those drafts are not sued on in this action. They are introduced merely as part of the *res gesta* of the loan, and the conversation of the parties on the subject of the drafts was also a part of that *res gesta*. They equally constituted parts of the transaction. The witness might have preferred to receive the drafts in that form; he might have preferred to receive drafts payable to any third person. Evidence as to the reason why they were made in one form rather than another does not in the least vary or contradict the drafts themselves. As the form of the drafts might confuse the jury, the plaintiffs had a clear right to explain how they came to be made as they were. The fact in question was the loan. The circumstances of the negotiation constituted the *res gesta* of the loan. The drafts were one of those circumstances; the conversation of the parties was another. Evidence of the reason why a loan was made in particular funds or securities, instead of cash, is perfectly competent where it will tend to elucidate the nature of the transaction, when that is the question at issue. The question here was, whether the loan was made to Sherman or to the bank. The note given for the repayment of the loan was given by Sherman individually. The drafts in which he received the loan were made payable to him as cashier. Neither the one nor the other of these documents can prevent the parties from showing, as a matter of fact, to whom the loan was really made. The defendants were endeavoring throughout the cause, contrary to the form of the note, to show that it was really the obligation of the bank, and that the loan was made to the bank. This they had a clear right to do, as the plaintiff had an equally clear right to show the contrary. The principle which governs such cases was explained and enforced by

Statement of the fifth error assigned.

this court in the case of *Baldwin* v. *The Bank of Newbury.** There was no error in the admission of this evidence.

The next exception, which is the subject of the fourth assignment of error, related to evidence of a similar character. Sherman, on his cross-examination, stated that he had learned about the stock being for sale from Mr. Huyck, the president of the Merchants' Bank, without knowing whose stock it was until he had made arrangements for his loan, and went to Huyck for the certificate of stock, when he found that it belonged to one English, a director of the bank. He was then asked, on re-examination by the plaintiff, what Huyck said at the time of delivering him the certificate, as to the sale, delivery, and price of the stock. To this the defendants' counsel objected, but the question was allowed.

We think that in this also there was no error. The object of the cross-examination evidently was to show that the bank, through its president, was concerned in the purchase of the stock, and that, therefore, the loan must have been made on its account. As the witness's purchase of the stock was made through Huyck, the conversation between them when the purchase was made was part of the *res gesta* of the purchase—part of the transaction itself. For that reason it was clearly competent. Like the loan, the purchase of the stock was a fact accomplished by conversations and acts. In proving this fact these conversations and acts were competent evidence. Conversations, in such cases, are not adduced so much to prove ulterior facts stated therein as to prove the conversations themselves as facts constituting part of the transaction. Hence they are not hearsay, but original evidence.

It further appeared from Sherman's testimony that when he had received the two drafts from Hutchinson he delivered them to Huyck, the president of the Merchants' Bank, who delivered them to English upon his entering the bank a few minutes afterwards, and that English handed them to the

* 1 Wallace, 240, 241.

Statement of the sixth error assigned.

receiving teller. The plaintiffs' counsel then asked the witness for what purpose the drafts were delivered to English. The allowance of this question (which was objected to) is the fifth error assigned. Its propriety is evinced by the answer to it, which was that the drafts were delivered to English in payment of the stock. The position of the parties is material. It had appeared by Sherman's testimony that he was the purchaser of the stock; that the drafts belonged to him, having been borrowed by him to pay for the stock; that he had purchased it through Huyck, but that the stock belonged to English, who was the vendor; that he, the witness, handed the drafts to Huyck on his return from the defendants' bank, and that Huyck, a few minutes after, handed them to English. Surely one of the principals in this transaction, under these circumstances, was competent to testify as to the purpose for which the drafts were delivered to English. If the declarations of a man when doing an act may be proved in his own behalf to show the purpose and intent with which it was done, as numerous authorities show,* it must be competent for a party to the transaction, cognizant of all the circumstances, and a witness of the act, to state its purpose, being subject, of course, to cross-examination. The manner and form in which an act is done, being one of several acts concurring to one purpose or transaction, indicate even to a mere observer, by shades of circumstance often difficult to analyze, what was the character of the act, or the intent and purpose with which it was done.

It further appearing, on Sherman's cross-examination, that the drafts were not indorsed by him until after English had delivered them to the receiving teller, the defendants objected to Sherman's being asked the reason why they were not indorsed when given to English. The allowance of this question was made the ground of another exception, and is the subject of the sixth assignment. We can see no objection to the question. If the fact that the drafts were not

* Starkie on Evidence, 51, 87; 1 Greenleaf on Evidence, § 108.

Statement of the seventh error assigned.

indorsed when delivered to English is of any consequence, the reason why they were not indorsed would seem to be of equal consequence. It might have been an oversight. It might have been something else. Whatever it was the reason should go with the fact, so that the latter might not have a greater effect on one side or the other than it ought to have. Facts proved by way of circumstantial evidence may always be explained by the party against whom they are adduced.

Further evidence was given in the case tending to show that the loan was entered in a memorandum-book kept by the defendants, as made on the note of Sherman individually and not as cashier; and that the amount of the two drafts was placed to the credit of English on the books of the Merchants' Bank, and that he checked out the same; and that Sherman was credited for the amount of dividend due on the stock. A statement of further evidence, containing the testimony of Hutchinson and Frissell, the cashier and assistant cashier of the defendants, materially conflicting with that of Sherman, is annexed to the bill of exceptions, but not made a part of it, and, therefore, cannot properly be taken into consideration.

The evidence being closed, the respective parties prayed the court to give certain instructions to the jury. The seventh error assigned is that the court granted the plaintiffs' first prayer for instructions, which was in substance that if the jury found, from the evidence, that the note of Sherman was passed to and received by the defendant as the evidence of money or negotiable drafts lent to him, and that the sole consideration on which the loan was made was the personal responsibility of Sherman on said note and the collateral stock, then the said Merchants' Bank was in no way chargeable with the note, nor could it be legally tendered to them by the defendant as part payment of Robinson's check, unless the jury should find from the evidence that said loan was really made to Sherman in behalf of the

Merchants' Bank, and the proceeds thereof went to its use and benefit. This instruction was given, subject to the qualifications contained in the first instruction prayed for by the defendant, which were, in effect, that if the contract of loan was really between the two banks, then the note ought to be allowed as part payment of the check. The substance and effect of the instruction, and indeed of the whole charge, was, that if the jury believed that the loan was made to Sherman for the Merchants' Bank, they must find for the defendants; but if made to him on his own behalf they must find for the plaintiff. This seemed to be the pole star which guided the court in all its answers to the various instructions applied for. And we think the court was clearly right. The case seems to have been very fairly put to the jury on this cardinal point, and it would be a useless task to make a critical examination of each request for the purpose of showing the truth of this proposition.

The tenth error assigned is the refusal of the court to charge that the plaintiff could not recover unless the jury found that, before suit brought, the note of Sherman and the collateral certificate of stock attached thereto were tendered to the defendants. Why should these papers be again tendered? They were once tendered and refused. The objection is not even plausible.

The eleventh assignment complains of the refusal to charge that the Merchants' Bank was liable for the loan, if it had been in the habit of borrowing money of the defendants by Sherman, as cashier, and if the defendants *believed* that the loan in question was for the benefit of the Merchants' Bank. The evident answer to this assignment is, that the *belief* of one party to a transaction is not the criterion by which the rights of the parties are to be governed, unless the other party, by his conduct or declarations, induced that belief. The naked fact of previous loans being made to the Merchants' Bank, through Sherman as cashier, could not, as a matter of law, be adjudged as sufficient cause for such a be-

lief on the part of the defendants in view of the other evidence in the cause.

The eighth, ninth, and twelfth errors are founded upon the refusal of the court to instruct the jury that the Merchants' Bank was bound by an alleged settlement of the controversy, if they believed certain evidence which does not appear upon the bill of exceptions, namely, to the effect that the president of the Merchants' Bank, on the day after the presentation of the check sued on, in a conversation with Hutchinson, acceded to his view of the subject and allowed Sherman's note as part payment of the check. It appears that the court granted the two former instructions prayed for, with this qualification, namely, *provided* the loan was originally made between the defendant and the Merchants' Bank, and not with Sherman, or that the proceeds went to the benefit of the bank as part of its assets or property. As the bank went into bankruptcy within forty-eight hours after this supposed settlement, the qualification was probably not an unreasonable one. But as the bill of exceptions before us does not contain a particle of evidence on the subject, it is unnecessary to decide this question.

These being all the errors assigned, the judgment must be

AFFIRMED.

THE NUESTRA SEÑORA DE REGLA.

1. In prize cases, wherever it appears that notice of appeal or of intention to appeal to this court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it.
2. Counsel fees before a commissioner on the settlement of damages on an award of restitution, disallowed as excessive and unwarranted.
3. A Spanish-owned vessel on her way from New York to Havana put in distress, by leave of the admiral commanding the squadron, into Port Royal, S. C., then in rebellion, and blockaded by a government fleet, and was there seized as prize of war and used by the government. . . . She was afterwards condemned as prize, but ordered to be restored. She never was restored. Damages for her seizure, detention, and value being

awarded. *Held*, that clearly she was not lawful prize of war or subject of capture; and that her owners were entitled to fair indemnity, though it might be well doubted whether the case was not more properly a subject for diplomatic adjustment than for determination by the courts.

APPEAL from the District Court for the Southern District of New York.

The steamer Nuestra Señora de Regla, then recently built in New York for a Spanish corporation doing business in Cuba, and owned by it, was on her way, November, 1861, to Havana. On her voyage thither, being in distress and want of coal, she put into Port Royal, near Charleston, S. C. (then in rebellion against the United States, and blockaded by a government squadron), under permission of the admiral in command. She was here seized November 29th, 1861, as prize of war, and used by the government till June, 1862, when she was brought to New York and condemned in prize. On the 20th of June, however, in the following year (the United States in the meantime using the vessel), a decree of restitution was ordered. The vessel, however, never was restored. The case being referred to a commissioner to ascertain the damages for the seizure and detention, he made a report on the 10th of May, 1871, in which he awarded—

For the use of the vessel from November 29th, 1861, up to and including June 20th, 1863, being 568 days, with interest at the rate of six per cent. per annum to the date of his report, ...	$167,870 66½
For expenses and services of claimant's agent in remaining with and attending to said vessel, . .	5,680 00
For counsel fees in defending the proceedings, . .	5,000 00
For the value of the vessel when she shall have been restored, at the rate of six per cent., with interest,	36,833 33½
Total, ...	$214,884 00

Several exceptions (not necessary to be specified, as they were not passed on by this court) were taken to this report by the government, but on the 28th of October, 1871, the exceptions were overruled and the report confirmed, and final judgment rendered against the libellants and captors for said sum, together with $6086.84, interest thereon from

the date of the report to the date of this decree, the sum as finally decreed amounting, in all, to $220,970.84.

On the 7th of November, 1871, the United States filed with the clerk of the District Court at New York, notice that the libellant "appeals to the Supreme Court of the United States from the decree made in the said action on the 28th of October, 1871," and the case was now here, and a notice of the appeal served by copy on the proctor for the claimants, on the 17th of the same month. On the 17th of February, 1872, the appeal was allowed by Mr. Justice Swayne, of the Supreme Court, at Washington, and the claimants cited to appear before said court on the 21st of March, 1872.

The questions were argued in this court:

1st. Whether the court had jurisdiction?

2d. If it had, how the case stood on merits?

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the appellants; Mr. W. M. Evarts and C. Donohue, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In prize cases, wherever it appears that notice of appeal, or of intention to appeal, to this court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it. An appeal is accordingly allowed in this case, under the second section of the act of March 3d, 1873, making appropriations for the naval service, and for other purposes.

The decree of the District Court included the sum of $5000, for counsel fees. We think that the amount was greatly excessive, and the allowance of counsel fees wholly unwarranted.

It is clear that the vessel was not lawful prize of war or subject of capture, and the corporation which owned her is doubtless entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel; but it may be

well doubted whether it is not more properly a subject of diplomatic adjustment than of determination by the courts.

For the errors in the decree already indicated, it is REVERSED, and the cause is

REMANDED FOR FURTHER PROCEEDINGS.

BRANSON v. WIRTH.

The government, as appeared by the *exemplification* of the record of a patent, had granted, January 10th, 1818, to A. the northeast quarter of a certain tract of land, in pursuance confessedly of a warrant and location upon *that* quarter; the exemplification of the record of the patent, however, showing that eight years after the date of the patent a "memorandum" had been made [by whom did not appear] on this record, that the patent itself was issued for the *south*east quarter. The government had confessedly issued a patent to Z. for this *south*east quarter on the 7th of January, 1818; that is to say, three days before the date of the patent to A., for whatever corner the patent to A. really was. In 1819 A. conveyed to B. the *south*east corner, describing it as the quarter which had been granted by patent to him, January 10th, 1818. In 1824 B. conveyed to C., describing the land as the *south*east corner. In 1825 C. conveyed to D.; and in 1829 D. conveyed to E., the deeds of both these last describing the land as the *south*east corner; but the latter deed not being put on record. In 1827 a private act of Congress was passed authorizing the legal representative or assignee of A. to register with the register of the proper land office any unappropriated quarter-section, &c, "in lieu of the quarter-section patented to the said A. on the 10th of January, 1818, which had been previously patented to Z.;" and in pursuance of this act E. did, in 1838, enter another lot.

In 1843, on an assumption that the government had conveyed away its title to it, the *north*east quarter was sold under the laws of Illinois for State taxes and bought by O. And in 1868, on an assumption that the title was still in the government, the same quarter was patented by the United States to P.

On a suit by P. against O., *Held*—

1st. On a supposition that the patent was given for the *north*east quarter, that there was no estoppel shown either by the deeds from A. to E., both inclusive, or by the act of Congress (it being a private act), or by E.'s selection of a new lot which prevented the defendants from showing the truth of the case, to wit, that the patent was for the *north*east quarter.

Statement of the case.

2d. That the "memorandum" on the record being no part of the record, and but the memorandum of a third person, could not be received in evidence to contradict the record.

3d. That accordingly it was error to have instructed the jury that the defendants had not shown outstanding title in the northeast quarter (the lot sued for), either in A. or in any one under him, and that the plaintiff was entitled to recover.

IN error to the Circuit Court for the Southern District of Illinois; the case being thus:

Wirth brought ejectment against Branson and another for the recovery of the *north*east quarter of section 18, in a certain township in Fulton County, Illinois. On the trial he made title under a patent from the United States to one Leonard for the lot in question, dated 20th February, 1868.

The defendants claimed title under a sale of the lot for taxes in 1843 under the laws of Illinois, in consequence of the non-payment of the taxes laid in 1839. But as public lands cannot be taxed, it was necessary for the defendants to show that the government title was extinguished prior to 1839. To do this they gave in evidence, from the records of the General Land Office, an exemplified copy of a military land warrant for 160 acres of land issued to Giles Egerton, in December, 1817, a location thereof in his favor upon the lot in question on the 10th of January, 1818, and a patent to Egerton for the same lot dated on the same day. But on the margin of the exemplified copy of the patent was a memorandum, copied as follows, viz.:*

"INDORSED.

"This patent was issued for the *S.* E. quarter instead of the *N.* E. quarter, as recorded; sent certificate of that fact to *E. B. Clemson*, at Lebanon, Illinois. See his letter of 19th May, 1826."

The defendants did not offer this memorandum in evidence, and objected to its being read, but, at the instance of the plaintiff, it was allowed to be read to the jury.

* The word "*indorsed*," in said memorandum, was in red ink. The rest of the memorandum in black ink.

Statement of the case.

The defendants then gave in evidence a deed dated July 29th, 1819, from Giles Egerton to one Thomas Hart for "the *south*east quarter of section 18," &c., closing the description as follows:

"Which quarter-section was granted to the said Giles in consideration of his military services, as will appear by a patent obtained from the General Government, dated the 10th day of January, 1818."

[The defendants contended that the word "*south*east" in this deed was written by mistake, and should have been "*north*east."] They further adduced (and in support of this view) an exemplified copy of a patent from the United States to one James Durney (another soldier), dated January 7th, 1818 (that is to say, three days before the alleged grant to Egerton), for this *south*east quarter of section 18.

The plaintiff in rebuttal gave in evidence deeds for the *south*east quarter-section as follows: from Thomas Hart to Samuel Hunt, dated 12th May, 1824; from Hunt to *E. B. Clemson*, dated 7th April, 1825; and from Clemson to John Shaw, dated 20th October, 1829; the two former being regularly recorded; the last not recorded. The plaintiff then gave in evidence an act of Congress, approved March 3d, 1827, entitled "An act for the relief of the legal representatives of Giles Egerton," by which it was enacted that the legal representative or assignee of Giles Egerton be "authorized to enter with the register of the proper land office, any unappropriated quarter-section of land in the tract reserved, &c., *in lieu of the quarter patented to the said Giles on the 10th day of January*, 1818, *which had been previously patented to James Durney*, and upon such entry a patent shall issue to such representative or assignee for the quarter-section so selected." The plaintiff then proved that John Shaw entered another lot in April, 1838, in pursuance of this act. To all this evidence offered by the plaintiff in rebuttal the defendants objected.

It thus appeared from the records of the land office (barring the memorandum in the margin of the patent), that the

Argument in support of the ruling.

*north*east quarter of section 18, which was the lot in question, had been regularly entered under a valid land warrant, and regularly patented; but it also appeared that the patentee, either by mistake of the scrivener or from some other cause, had conveyed to a third person the *south*east quarter of the same section, as the lot so patented; and that the subsequent conveyances copied this description. Also that one of the subsequent grantees, several years afterwards, finding the *south*east quarter embraced in a prior patent, got leave from Congress to enter another lot in the place of it, and did so.

This was all the evidence in the cause. The patent itself was not produced; nor did it appear what had become of it.

The court instructed the jury, that the defendants had not shown outstanding title to the lot in question, either in Giles Egerton or in any one claiming under him, and that the plaintiff was entitled to recover. To this charge the defendants excepted.

Mr. Horatio C. Burchard, in support of the ruling below:

I. *Egerton's patent granted the southeast quarter.*

Four independent facts seem to show that although Giles Egerton was entitled to receive upon his location a patent for the *north*east quarter, the patent he actually received was for the *south*east quarter.

1st. The marginal entry on the record.

2d. The recitals in Egerton's deed to Hart.

3d. The conduct of the subsequent grantees.

4th. The recitals in the act of Congress of March 3d, 1827.

1. *The marginal entry.* This was undoubtedly written upon the face of the record. It has stood there since 1826; nearly fifty years. It cannot be presumed to have been made without the authority or sanction of the officer having charge of the records; the Commissioner of the General Land Office. It was there of record, and upon the page of the record of the alleged patent, when the commissioner, in 1868, made the exemplified copy of the record offered in evidence below. He had no right to separate them. They were the record as he found it.

Argument in support of the ruling.

2. *The recitals in Egerton's deed.* Egerton declares in his deed to Hart that it will appear by his patent, obtained January 10th, 1818, that the *south*east quarter of section 18, &c., was granted to him in consideration of his military services. He doubtless then had in his possession the patent actually issued to him on the 10th of January, A.D. 1818, and from it himself drew, or the scrivener for him, the deed to Hart. The deed itself supports this conclusion; it contains internal evidence of the fact. The description of the tract, the recitals of Egerton's title and consideration for which he obtained a patent, and date of its issue, must have been taken from the patent. The particular quarter-section upon which a bounty land warrant should be located in a military tract was then determined by lot, and not by selection, as at present.* The soldier held no certificate of location. His patent was the only evidence furnished him as to what tract he had become the owner of.

3. *The conduct of Egerton's grantees.* It is evident that there was a mistake in the patent to Egerton, as intended to be issued, or in the deed from him to Hart, and in the mesne conveyances from Hart to Shaw. If the successive deeds followed the patent, each purchaser inspecting the title-papers of his grantor would have no occasion to question the validity of the title he was about to acquire. When, however, it appeared that an elder patent had been issued to Durney for the *southeast* quarter, it behooved the last grantee, tracing title to that tract through Egerton, to examine his title-papers and ascertain and have rectified any mistake occurring therein. To do this required a comparison of deed with prior deed and with the patent. If a misdescription had occurred in any mesne conveyance, or in the deed from Egerton to Hart, the mistake would have been sought to be corrected by a new deed from Egerton, or a bill in chancery had he refused to execute one. The conduct of the parties—the grantees of Egerton—shows that no mistake was discovered in the deeds, and no variance in them from

* Act of April 29th, 1816, Land Laws, vol. 1, p. 702.

Argument in support of the ruling.

the patent. No new deed appears to have been executed or proceedings instituted to correct a mistake in the deeds and make them correspond with the patent. On the contrary, the grantee came to the United States claiming that his deed and the patent to Egerton were conveyances of the *south*east quarter of section 18, and that as the tract had been granted by an elder patent to Durney, the government should give the legal representative or assignee of Giles Egerton the right to select another quarter-section in lieu thereof. The fact that Durney's patent for the southeast quarter was older than Giles Egerton's must have been ascertained *by an examination of the latter patent itself.*

4. *The act of March 3d*, 1827. The act, as a reason and justification for its passage, alleges that the quarter patented to Giles Egerton on the 10th day of January, A.D. 1818, had been previously patented to Durney. The court will not presume that the legislative department declared this to be a fact and gave it the sanction of a legal enactment without satisfactory proof of its truth. The patent itself, at that time in the possession of Egerton or his grantee, was, doubtless, produced before the committee which examined and recommended the passage of the bill.

The four facts to which we have adverted corroborate each other, and taken together are only reconcilable with the conclusion that no matter what patent should have been and was intended to be issued to Giles Egerton, the patent signed, sealed, and received by him, purported to grant the *south*east quarter and not the *north*east quarter.

The proof, therefore, shows that—

II. *The legal title to the northeast quarter remained in the United States until the issue of the patent to Leonard.*

The location of Egerton's bounty warrant upon the land did not convey to him the legal title. It gave him a right to a conveyance, which right he could waive or relinquish. The title of the United States can only pass by patent or by act of Congress in words of present grant.*

* Wilcox v. Jackson, 13 Peters, 499.

Argument in support of the ruling.

III. *The plaintiffs in error are estopped from setting up title in Egerton.*

They present the issue of a patent to Egerton for the *north*east quarter, either as a basis of title in themselves or as an outstanding title in him or in Hart. They can assert for or under him no better title than he could for himself or his grantees.

A person claiming title under one who is estopped, is also bound by the estoppel.*

1st. Egerton, by the deed to Hart of the *south*east quarter, and its recitals that his patent granted that tract, and by the successive conveyances from Hart to Shaw, with the acceptance by the latter of another quarter-section from the United States in lieu of that quarter, became estopped from claiming that his patent granted him the *north*east quarter.

A person is always estopped by his own deed, and will not be allowed to aver anything in contradiction of what he has once solemnly and deliberately admitted.† Admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the party whose conduct he has thus influenced.‡

2d. Egerton's successive grantees, Hart, Hunt, Clemson, and Shaw, are bound and estopped by the recital and facts that estop Egerton.

A party who executes a deed is estopped from denying not only the deed but every fact which it recites, and all persons claiming under and through the party estopped are bound by the estoppel.§

3d. The recitals in the act of Congress of the 3d of March, 1827, and Shaw's entry of a quarter-section under its provisions, also estop him from questioning the truth of the

* McCravey v. Remson, 19 Alabama, 430; Phelps v. Blount, 2 Devereux, 177.

† Lazon v. Peeman, 3 Mississippi, 529; Denn v. Brewer, Coxe, 172; Ridgway v Morrison, 28 Indiana, 201.

‡ McClellan v. Kennedy, 8 Maryland, 230; Cummings v. Webster, 43 Maine, 192.

§ Stow v. Wyse, 7 Connecticut, 214.

facts recited in the act.* The act asserts that the quarter patented to Egerton on the 10th day of January, A.D. 1818, had been previously patented to Durney. The latter's patent was for the *south*east quarter. Egerton's patent, therefore, according to the act, granted that quarter. Shaw, Egerton's remote grantee, availed himself of its provisions; he must be held to admit its statements. The entry was to be in "lieu of" the quarter patented to Egerton, so that *it was a relinquishment by Shaw of whatever quarter that patent granted.* The act and the entry would estop Shaw, and all parties whose right or title under the patent Shaw had acquired, from claiming title under the Egerton patent.

4th. The estoppel is available at law. Equitable matters creating an estoppel have been recognized in many cases as available at law.†

Mr. S. C. Judd, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The court below instructed the jury, that the defendants had not shown outstanding title to the lot in question, either in Giles Egerton, or in any one claiming under him, and that the plaintiff was entitled to recover. To this charge the defendants excepted.

The court did not state the ground on which the charge to the jury was based; whether on the ground that the original patent of Giles Egerton was in fact given for the southeast quarter-section, and not for the northeast quarter; or on the ground that Egerton and those in privity with him were estopped on that point.

We will first consider the ground of *estoppel*, on the supposition that the patent was, or may have been, in fact given for the lot in question, but that the supposed estoppel prevented Egerton, and those in privity with him, from alleg-

* Cary *v.* Whitney, 48 Maine, 516.

† French *v.* Spencer, 21 Howard, 228; Brown *v.* Wheeler, 17 Connecticut, 345; Corbett *v.* Norcross, 35 New Hampshire, 99.

ing that fact. What, then, was this estoppel? Who was bound by it? and who can set it up?

The supposed estoppel is founded on the deed given by Egerton to Hart, in July, 1819, for a lot described as the *southeast* quarter of section 18, and as granted to Egerton by his patent of January 10th, 1818.

Now if the patent thus referred to was, in fact, for the northeast quarter, there was a mere mistake in the deed which might have been rectified in equity, or, perhaps, by a reference to the patent itself. But standing as it did, without being reformed, what at most was the estoppel which it created? and who could have taken advantage of it at that time? First, Egerton was technically estopped, at law, to deny that his patent covered the southeast quarter, which the deed, in terms, conveyed; secondly, this estoppel related only to the southeast quarter; thirdly, it existed only as between Egerton on the one side, and Hart on the other, and their respective privies. Thus far, it did not bind the government, nor could the government take advantage of it, being a stranger to the estoppel. It did not impair the title of the government, or of its patentee, to the southeast quarter, assumed to be conveyed; nor did it reinvest the government with the title to the northeast quarter. If the original patent was in fact for the northeast quarter, the government could not have reclaimed that quarter against its own patent, whatever deed Egerton may have given to a third party for a different lot. And Egerton's heirs, or his grantees of the northeast quarter, would have stood in his place. And the defendants in this case, coming into possession of that quarter under a tax sale, are to be regarded in the same light (at least that is the plaintiff's claim) as Egerton himself would be if he were in possession of it.

Such was the position of the parties at the giving of the deed to Hart in 1819. Has anything since occurred to change that position, and to divest the title of the lot in question out of Egerton, or his legal assigns, by estoppel? We think not.

The assumed title to the southeast quarter conveyed to

Hart passed from hand to hand by several mesne conveyances until, in 1827, the then grantee procured the act of Congress, authorizing him to enter another lot in lieu of the southeast quarter, which the act supposes to have been patented to Egerton, but previously patented to James Durney. It is contended that this act and the subsequent entry of another lot in pursuance of it, operated to estop Egerton and his grantees from claiming the northeast quarter.

But the legal estoppel which affected Egerton and his grantees, was not changed by that act. And in speaking of the grantees of Egerton, we must distinguish between those claiming under the deed to Hart, which assumed to convey the *southeast* quarter, and those claiming (as the defendants do) as grantees of the *northeast* quarter. The former class are those who are entitled to claim the benefit of the estoppel; the latter we are supposing to be bound by the estoppel. The act of Congress was procured in 1827 by the grantee under the deed to Hart, eight years after the date of that deed; and it recites that the patent was for the southeast quarter. Now it is well settled that recitals in a private act bind none but those who apply for it.* The act in question was made for the benefit of the grantee under Hart's deed. He claimed the southeast quarter, but found that it had been patented to Durney; and he applied for leave to enter another lot. How can his act change or enlarge the estoppel by which Egerton and his grantees of the lot in question were bound before? A person entitled to the benefit of an estoppel may transfer it by transferring the estate, but he cannot change it or enlarge it. Every grantee of the southeast quarter, through Hart, to the end of time, may estop Egerton and his assigns from denying that his patent was for the southeast quarter. But the government is not a grantee of that quarter under or through Hart. The government is still, in law, a stranger to the estoppel.

It is supposed that Egerton and his assigns are estopped by the fact that the government was induced to give to Eger-

* Elmondorff v. Carmichael, 3 Littell, 472, 480. 2 Cowen & Hill's Notes, 251.

ton's grantee another lot in consequence of the declaration contained in his deed to Hart. This may be ground for an equitable estoppel, not a legal one, and therefore not available in an action of ejectment where the title is in issue. If one person is induced to do an act prejudicial to himself in consequence of the acts or declarations of another, on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations. But, then, the person charged has an opportunity of explaining, and equity will decree according to the justice of the entire case.* Had the government, after granting another lot to Egerton's grantee, in pursuance of the act of Congress, filed a bill against Egerton to prevent him from asserting title to the lot in question, perhaps it would have been a good defence for him to have shown that the discrepancy in his deed was a mere mistake, and that the agents of the government had no right to rely on it, because their own records would have shown that the patent was in fact given for the northeast quarter. But however this may be, the only estoppel arising out of the transaction referred to, which the government could set up, was an equitable and not a legal one.

Even if it were otherwise, and if the government *could*, in any aspect of the case, claim the benefit of the legal estoppel, it would be prevented from doing so by its own patent granted to Egerton. That would present the case of estoppel against estoppel, which Lord Coke says setteth the matter at large.† No one can set up an estoppel against his own grant. Whoever else, therefore, might set up the estoppel against Egerton's title to the lot in question, the government could not do so. Its own patent would stand in the way. And whatever the government could not do, its subsequent grantees could not do.

It is suggested that Egerton's grantee, who procured the act of Congress and a patent for another lot, represented Egerton, and by his acts bound Egerton in the same manner

* 2 Smith's Leading Cases, 702, 748, ed. 1866.

† Coke Littleton, 352 b; 2 Smith's Leading Cases, 658 [584].

as himself. But this may well be questioned. He could bind himself by his own acts; but he could only bind Egerton to the extent of Egerton's deed, and the effect of that has been fully considered. Egerton never asked the government for another patent, nor did he authorize his grantee to do so. The transaction which took place between that grantee and the government was, as to Egerton and his grantees of the lot in question, *res inter alios acta.*

The conclusion to which we have come on this part of the case is, that there was no estoppel shown by the evidence which would prevent the defendants from showing the truth of the case, as to which quarter-section was actually granted to Giles Egerton by his patent of January 10th, 1818.

This is, therefore, the next question to be considered. Had the patent itself been exhibited on the trial, it would have ended all controversy on the subject. But it was not exhibited, and it did not appear what had become of it. An exemplified copy, however, of the record of it, as it remains in the archives of the General Land Office, was produced. This showed that the patent was for the northeast quarter of section 18, being the lot in controversy. It was also shown from the same records, that this lot had been duly entered in favor of Egerton, under his military land warrant, on the day of the date of the patent. It was further shown, that the southeast quarter of section 18 had three days before been patented to another person, Durney. This cumulative evidence seems irrefragable to the effect that the patent was in fact given for the lot in controversy.

Against this evidence, we have only, first, the description in the deed from Egerton to Hart, where the word "southeast" is used instead of "northeast;" secondly, the memorandum in the margin of the record, and thirdly, the recital in the act of Congress. As to the first, it is a kind of variance which so frequently occurs by mistake of the scrivener (as every surveyor and land lawyer knows), that it is scarcely worthy of a moment's consideration, when opposed to the record of the patent. As to the second—the memorandum made in the margin of the record—it is not known when it

was made, except that it must have been after the 19th of May, 1826, the date of the letter referred to in the memorandum itself, which was eight years after the date of the patent; nor is it known who made it, nor on what evidence it was made. Such a memorandum, being no part of the record itself, cannot be received to contradict the record. It would be a very dangerous precedent to allow it to have that effect. It is not the record of any act of the department, nor of any document entitled to registry in its archives. It is nothing but a memorandum of a third person, and hearsay evidence at best.

As to the recital of the statute, whilst the recitals of public acts are regarded as evidence of the facts recited, it is otherwise, as we have seen, in reference to private acts. They are not evidence except against the parties who procure them.* The statute in question is a mere private act, and cannot be received as evidence, except as against the person who procured it, who was not Egerton, but his remote assignee under the Hart deed. It can only be used as evidence against the person on whom it acts as an estoppel.

We conclude, therefore, that the charge of the court below was erroneous, and that the judgment must be REVERSED, with directions to award a

VENIRE DE NOVO.

OLCOTT v. BYNUM ET AL.

Under the statutes of North Carolina regulating the conveyance of real estate in that State, no copy of a registered *copy* of a deed can be read in evidence in place of the original, even if it be proved that the original is lost.

A resulting trust of land does not arise in favor of one of two joint purchasers, unless his part is some definite portion of the whole, and what money he pays is paid for some aliquot part of the property, as a fourth, third, or a moiety. Nor can it arise in any case for more than the

* 2 Phillips on Evidence, 106, 6th Am. ed.

Statement of the case.

money actually paid. Thus, if B. buy land worth $25,000, and with A.'s money pay $5000 and give his own bond and mortgage for the balance, no trust results for more than the $5000 at best.

A resulting trust cannot be created by advances or funds furnished after the time when the purchase is made.

There not being in North Carolina any statutory provision relating to express trusts, "manifested and proved," similar to the provision in the seventh section of the Statute of Frauds, such trusts in that State stand as at common law.

A deed of trust with power of sale (a deed, therefore, in the nature of a mortgage), provided that money should be paid in three equal instalments, and that in default of payment of any one "that may grow due thereon," all the mortgaged premises might be sold and a deed of the premises made to the purchaser, and that it should be lawful for the trustee "out of the money arising from such sale to retain the principal and interest which shall then be due" . . . rendering the overplus to the mortgagor. *Held* (*the property being incapable of advantageous sale in parts*), that when one instalment fell due, the trustee had a right to sell, and though there was a surplus above what was necessary to pay the instalment due, yet that the trustee might reserve the whole and apply it to the residue of the mortgage debt.

A sale of a large and valuable property under a deed of trust in the nature of a mortgage, held under the proofs to have been properly made in a body, and for cash alone, and on the premises themselves, though they were in a remote part of Virginia.

ERROR to the Circuit Court for the District of North Carolina; the case being thus:

In the year 1854, the High Shoals Manufacturing Company owning 14,873 acres of land in the counties of Lincoln, Gaston, and Cleveland, in North Carolina, having upon it two water-powers, abounding in iron ore and other minerals, and having erected thereon two iron-works, forges, furnaces, machinery, and other fixtures for the manufacture of iron, sold the same, *in a body*, to one Groot, who paid $75,000 therefor; $25,000 in cash and a mortgage of $50,000 to two persons, Bynum and Grier, trustees for the High Shoals Company. This mortgage not being paid, Bynum and Grier, on the 1st of January, 1859, foreclosed it by a public sale of the property *in a body;* one Hovey presenting himself as the purchaser. As a matter of fact, however, Hovey was only "a man of straw," the real purchasers being one Olcott and a certain Stephenson. There had been an agreement previous

to this sale that the purchase-money (which proved to be $48,500) should be paid:

Money down,	$8,500
Balance, mortgage,	40,000
	$48,500

And it was so paid.

The money down was paid by Olcott and Stephenson, and thus made up cash,	$6,800
Certain dividends due Stephenson (equivalent to cash) assigned,	1,700
	$8,500

A deed was accordingly made to Hovey January 1st, 1859, and on the same day *Hovey* gave a deed of trust with power of sale, or deed in the nature of a mortgage, for the balance, which was to be paid:

1860, January 1,	$13,333 33
1860, July 1,	13,333 33
1861, January 1,	13,333 34

All with interest from January 1st, 1859.

The deed of trust which was accompanied by a penal bond, provided,

"That if default shall be made in the payment of the said sum of money, or the interest that may grow due thereon, or of any part thereof, *that then*, and upon failure of the grantor to pay the first or any subsequent instalment, as hereinbefore specified, it shall be lawful for the trustee to enter upon all and singular the premises hereby granted, and to sell and dispose of the same, and all benefit and equity of redemption, &c., and to make and deliver to the purchaser or purchasers thereof a good and sufficient deed for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertising and sale of the same premises, rendering the overplus of the purchase-money, if any there shall be, unto the said Hovey, &c.; which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said Hovey, his heirs and assigns, and all other persons claiming the premises, or any part thereof, by, from, or under him, them, or either of them."

A few days after the conclusion of these arrangements, that is to say on the 8th of January, 1859, Hovey, as he testified in a deposition found in the record, and as Olcott himself also testified, conveyed the premises to Olcott and Stephenson, by deed in due form. But no such deed was now to be found nor any registry of it. It was proved to have been lost, and a certified copy from the proper office was produced of a *copy* which had been registered there.

On the 18th of December, 1867, Stephenson released all his interest to Olcott, by deed in due form, of whose existence there was no question. Default in the first payment secured by the mortgage being made, the mortgagees, on the 31st of January, advertised the property for sale on the 8th day of March, 1860. Upon hearing of the advertisement of sale, Stephenson and Olcott wrote to Bynum, the acting trustee, as follows:

"NEW YORK, February 25th, 1860.

"DEAR SIR: You will recollect that when the High Shoal property changed hands in January, 1859, we stated to you that our aim would be to pay off the entire amount of the mortgage before the expiration of the year. To bring about a result so desirable to all parties interested, we have taken the position with our friends, in organizing a new company, that a less sum than the whole amount required to satisfy the mortgage would not answer our purpose. This, we have felt assured, was the true policy for us to pursue, and the only ground we could take and do justice to them, and realize what we had encouraged you to expect. We are now, we think, on the eve of accomplishing our aim, having already a large part of the required sum offered to us, but as we may not be prepared with the whole amount on the day fixed by you in the advertisement, we beg to ask the postponement of the day of the sale for a short time, under the conviction that we shall be able to meet your wishes and our own at a very early day, and much in advance of the average time named in the mortgage. We should like to have the time of payment put off to the 1st May, but if that is longer than you think ought to be granted, we must be satisfied with a shorter date.

"Although, by the strict letter of the contract, you have the

right to require us to fulfil its conditions punctually, yet, in view of the large amount already paid to the stockholders of the company which you represent, and the still larger sum expended upon the property, we hope it will not be deemed necessary to compel us to sacrifice these large disbursements at a time when the delay of a few weeks will enable us to protect them, and cannot jeopard or in any way prejudice the rights of those you represent.

"Recollecting and appreciating the good feeling evinced towards us by the stockholders of the old company during our long struggle with outside claimants, we dare venture to hope for the continuance of their indulgence for the brief period asked for to enable us to bring this our determined effort to cancel the entire debt to a successful issue.

"Believing that your good wishes are with us, and that you will, as far as you can consistently with your obligations to others, grant our request,

"We are, very respectfully, yours, &c.,

"E. S. STEPHENSON,

"T. OLCOTT.

"To W. P. BYNUM, Esq., &c."

The sale was accordingly postponed; and on the 19th of March, 1860, the property was again advertised as about to be publicly sold "*at* the High Shoals, Gaston County, N. C.," on the 28th of April; it being announced that "the sale will be positive and for cash."

This, and the further history of the matter, was thus given in the testimony of Bynum himself:

"I postponed the sale to the 28th of April, in compliance with the request of Messrs. Stephenson and T. Olcott, having business elsewhere on the 1st May. Mr. Olcott was informed of this postponement, both by letter from myself and from Thomas Darling, the agent upon the premises, and I was informed by the said agent that the arrangement was satisfactory to all the parties. On the 28th April, the property was duly exposed to public sale by me and Grier, as mortgagees, when and where (*on the premises at the High Shoals*), William Sloan, as the agent of the High Shoals Manufacturing Company, being the creditors, became the highest bidder and purchaser, at the sum of $43,200, the estimated debt and interest due on the mortgage. I am not

aware that there was any opposition bid, or that he made more than one bid. At the time of the sale, the creditor company were anxious to realize that debt without purchasing in the property. I and others accordingly made every reasonable effort, both before and at the sale, to induce the mortgagees to pay, or third parties to buy the property; and in fact, I did induce several capitalists from Charlotte to attend the sale, with the view of buying. But on surveying the property, they concluded to run the same to $35,000 and no more. At the time of sale, and during the entire bidding, both Hovey, the mortgagor and Darling, the agent of the New York company, were personally present and assenting thereto, well knowing that Sloan was bidding in behalf of the creditors, the old High Shoal Company. I expressly deny that Sloan was the agent of the mortgagees, or employed by them to bid off the property, but know that he was directed by the High Shoals Company to bid for them to the amount of their debt, and no more. I was, before said sale, informed, both by Hovey and Darling, that the purchasers had failed, and were unable to meet the payments, and they acknowledged the necessity of the sale and acquiesced in it, as representing the New York company. After the sale, the same day, or shortly thereafter, the penal bond of Hovey for $80,000 was credited with amount of said bid by Sloan, and the bond itself was cancelled in satisfaction of said debt.

"Mr. Olcott came to North Carolina and visited this property in the year 1860, and after said sale, and in repeated conversations with me, and with a full knowledge of said sale and all the circumstances connected with it, acknowledged the validity of the sale and the full and complete title of the purchasers at it. In the summer of 1860, he, on two occasions, visited me with the view of procuring a lease on a portion of said property, for gold-mining purposes, and the further view of purchasing the entire property, if his mining project proved successful. In fact he did procure from me a mining lease (to himself and one Muir), on a part of the property, which was in writing, and for the period of six months from that time, subject to be revoked at any time on the sale of the property. And I am informed that he did make explorations, &c., but finally abandoned his lease and left the State in April, 1861, or thereabouts. In March, 1862, by the direction of the High Shoals Manufacturing Company, I contracted to sell the property to R. R. & J. L. Bridgers,

for the sum of $65,000; $30,000 of said sum was to be paid in North Carolina bank bills, and the said sum was accordingly paid in miscellaneous bills of the various banks of the State, then considerably depreciated. The balance, being $35,000, was to be paid in specie or equivalent, in three and four years, with interest. The interest for two years has been paid on said debt and the balance is still due and unpaid. When the Messrs. Bridgers bought in March, 1862, they immediately took possession, and worked the property until their sale to Admiral Wilkes, in 1865, when the said Wilkes entered into possession, and has ever since occupied and worked the same."

After the sale of April 28th, 1860, no deed was ever executed by Bynum and Grier to Sloan until June 12th, 1860.

In this state of things Olcott, on the 22*d of April*, 1868, filed a bill in the court below, against Bynum and Grier (the trustees), Sloan, Bridgers, and Wilkes, setting out—

The purchase by Hovey for him, Olcott, and the Stephenson already mentioned; an express trust:

That the sale was not an execution of the powers of the mortgage deed, but an attempt irregularly to foreclose the mortgage by a mere agreement between Bynum and Grier, and Sloan, without any regard to the interest of the plaintiff and Stephenson, and was void against them:

That the exposure to sale of said property *in solido*, at *public auction, for cash, on the premises*, in a remote and unfrequented neighborhood, when there was due not more than $14,500 of the mortgage debt, was highly injurious to the mortgagors, and gave an assurance to the mortgagees of a foreclosure at an amount not greater than their debt:

That the property was easily susceptible of division, and that a fraction thereof would have brought the amount due at the time of sale, such amount being within the compass of the means of bidders; that the property was situated far in the interior of the country, where capital did not abound, where there were divers iron manufactories on a small scale, embracing investments of from $2000 to $10,000, but that there was no ground for expecting a purchaser of the whole property at a cash sale, unless it were the mortgagees or

their trustees, and that the result was a sacrifice of the property at such price as they chose to bid; that but a single bid was made, and that by the defendant, Sloan; that upon this the property was knocked down; but no money was paid and no deed executed; and soon thereafter the said trustees, the vendors, took possession in their character as such:

That the effect of this course of proceeding, unless relieved against by this court, would be to deprive the plaintiff of a property which had already been sold for $75,000, and was then worth more than that sum, to satisfy a balance of $40,000, of which only one-third was then due:

That on account of the threatening aspect of affairs in the Southern country, resulting in war, neither the plaintiff nor Stephenson visited North Carolina again until since the close of the war, after the announcement by the Chief Justice of this court that the Federal courts were again in the exercise of their full jurisdiction in that State:

That the purchasers, Messrs. Bridgers, in the first instance, and Charles Wilkes in the second, had notice of the equities of the plaintiff in the premises.

Answers having been put in, testimony was taken.

Bynum testified that he had an interest as a stockholder in the old High Shoals Company of $1200; that the property in question was the most valuable property in that vicinity; "that in the section of country where this property is situated he had never known property of the value of $40,000 or upwards set up at auction sale, in the lump for cash, but this."

Sloan testified "that the question whether the property could best be sold in separate parcels, with advantage to any of the parties concerned, was fully discussed by the stockholders of the original company before the sale, and it was deemed by them totally impracticable, as they could not, by such a course, obtain money enough to pay off the debt." He added, "If the sale had been on credit it might have been more advantageous to have offered the property in parcels; but that selling for cash, it was better to sell in bulk." He testified further that he was bidding only for the High Shoals

Company, not for Bynum and Grier; and that after the sale of the 28th of April, 1860, Olcott proposed to him to join in a new purchase of the property.

White, who had been acquainted with the property for thirty years, testified that in his opinion "the property could not be divided without destroying its value as an iron property."

It was further testified, by Bynum, that during the six years in which the property was held by Groot, and by Olcott and Stephenson, several thousand dollars' worth of timber was destroyed, and several thousand dollars' worth of ore was dug, and that the mills, machinery, dwellings, buildings, and fences were suffered to go to decay, to the great loss of the property. "That *before the sale to Groot* the company was leasing the property for $5000 per annum; but when they took possession again, under the sale of the 28th of April, 1860, the property was so injured and out of repair that he was unable to lease the manufacturing and valuable part of the same, and was able to rent only the tillable lands for a very small sum, to wit, about $500.

Witnesses of the other side, however, testified that much money had been laid out by Hovey and Stephenson on the property.

The court below dismissed the bill, holding that under the statutes of North Carolina, the copy *of the copy* of the unregistered deed from Hovey to Olcott and Stephenson, was not evidence, and therefore that Olcott had failed to show any connection with the property in question.

It may be well here to state that a statute of North Carolina* enacts that—

"No conveyance for land shall be good and available in law, unless the same shall be proved and registered in the county where the lands lie."

And that an act of 1846† allows to be read in evidence "the registry or duly certified copy of the record of any deed" duly registered.

* Revised Code, chapter 37, § 1. † Ib. § 16.

Argument against the sale.

And finally, that the seventh section of the Statute of Frauds is not in force in the State named. The section thus enacts:

"All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust . . . or else they shall be utterly void and of none effect."

Mr. W. A. Graham, for the appellant:

I. *As to the lost deed from Hovey.* The question here is, "Is a party to lose an estate granted by means of the loss of the deed before registration?" By the statute of North Carolina,* conveyances of lease are required to be "acknowledged by the grantor or proved on oath by one or more witnesses" and registered. In a case like the present, where there can be no literal compliance, on account of the loss of the original deed, which was a part of the primary evidence, we must resort to secondary evidence according to the rules of the common law. This can be done in a court of probate, in proceedings *ex parte*, as well as in courts of contestation. Here a copy is alleged to have been preserved, and copies are set out in the record.

The law of evidence requires in the circumstances of this case—1st, that the loss of the original shall be proved by the evidence of the plaintiff, the bargainer, in whose custody it was last seen; 2d, that the alleged copy is a true copy, and that the original was executed and delivered according to its import. Upon such proof the deed was properly ordered to be, and was, registered.

But if this deed were rejected there is abundant proof by parol that Stephenson and Olcott were entitled to the beneficial interest in the property, by their purchase in the name of Hovey, and their payment of part of and securing of the balance of the consideration. The well-known doctrine of equity applies, "that if one purchase an estate for another

* Revised Code, chapter 37.

with the money of the latter, a trust results to the latter." And, as to Stephenson's share, the plaintiff produces the deed of Stephenson, releasing all his right in the premises to himself.

II. *Passing then to the merits.* The next question is the validity of the alleged sale of the 28th of April, 1860. And it is to be remarked that Bynum, the trustee, who transacted the entire business, had an interest adverse to the plaintiff, being both a stockholder in the High Shoals Company and president. It is, then, the case of a mortgagee with a power of sale, and the manner of its execution is liable to the strictest scrutiny. Will it stand any scrutiny? We think not.

1st. The sale was made for cash *in toto.* The trustees had no power to sell for cash in this way *at the time when they did so sell.* Only one-third of $40,000, with interest on that third from January 1st, 1859, was *then* due and demandable. The plain duty of the trustees was either to wait till the whole fell due, 1st January, 1861, after which they could have sold for cash; or, if resolved to sell at once, to have set up the property for cash as to one-third, credit on another third till the 1st of July, 1860, and on the balance till 1st of January, 1861. The mortgage does not contain the word "cash;" it was a mere requirement of the trustees, without authority, which chilled the sale and depressed the price by thousands of dollars.

If a sale for cash *in toto* was not wholly *ultra vires*, the only footing on which it could be maintained, even upon the allegations of the defendants, would have been to credit the one-third of the debt then due upon the mortgage, require Sloan to pay down the residue of $26,666.66, and pass this over to the complainant. The alleged purchaser had no right both to the property and the money. A trustee has no right to receive money before it is due, much less to raise it by sale. It is further apparent from the continued action of Bynum and Grier, as trustees, with no other evidence of title except the deed of January 1st, 1859, that they were the purchasers at that sale. Had Sloan purchased for

the company, he or they should have been invested with title, and the trustees denuded. This was never attempted to be done till June 12th, 1868; after the filing of the bill in this suit. If our assumption of fact here be true, the old doctrine applies, that a trustee cannot purchase from himself.*

2d. But if the company be assumed to have been the purchaser, the sale was made in such disregard of the interests of the plaintiff that equity will not permit it to stand. Before a trustee can assert that he has foreclosed the rights of the mortgagor by a sale *in pais*, he should be able to show that it was such a sale as would have been ordered by a chancellor if application had been made to a court.

Now, no chancellor would have ordered a sale of this vast property for *cash* when only an instalment of $13,000 was due. Sloan admits that the property would have sold better on a credit, and in that case might have been enhanced in price by dividing it into lots.

So a sale of the property *in solido* in that state of the mortgage debt was a great wrong to the plaintiff. It may well be questioned whether a sale by a sheriff, under similar circumstances, would not have been void. If the property can be separated, and exceeds the debt, no more ought to be sold than will pay the debt. The presumption is, when the estate is very large and at all capable of division, that a sale in parcels will be most advantageous.

The opinion of the defendants' witnesses, that a sale in lots would not have been more advantageous, is entitled to little weight, when they themselves prove that no single estate of such magnitude exists, and none equal to it has ever been exposed at auction sale in that section of country, and it is obvious that by reducing the parts within the ability of bidders much more competition might have been expected.

3d. As to the place of sale, any neighboring town would obviously have been more eligible than this place, a remote and unfrequented one.

* Fox v. Mackreth, Leading Cases in Equity, p. 92, with notes.

Recapitulation in the opinion of the facts.

There is nothing in the letter from New York, February 25th, 1860, consenting to a sale for cash *in toto*, or agreeing to anything variant from the terms of the mortgage; it asks only that the trustees will not be too rigorous, and allow some six or eight weeks longer for an endeavor to raise money.

Mr. W. H. Battle, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The object and prayer of the bill in this case are to redeem certain premises therein described, consisting of upwards of 14,000 acres of land, sold by the defendants Bynum and Grier to the defendant Sloan, under a mortgage containing a power of sale. The mortgage was executed by the defendant Hovey, and bears date the 1st day of January, 1859. Bynum and Grier, as trustees for the High Shoals Manufacturing Company, were the mortgagees. The mortgage recites that Hovey had executed to Bynum and Grier a penal bond in the sum of $80,000 to secure the payment of $40,000 in three instalments of $13,333.33 each, the first payable on the 1st day of January, 1860, the second on the 1st of July, 1860, and the third on the 1st of January, 1861, all with interest from the 1st of January, 1859. It was conditioned that, in default of payment of either of the instalments or the interest thereon, or of any part of either when due, it should be lawful for the mortgagees to sell at public auction all the mortgaged premises, and to make and deliver to the purchaser a deed in fee simple, and out of the moneys arising from the sale to retain the amount of the principal and interest which should then be due on the bond, together with the costs and charges of advertising and selling, rendering the overplus, if any, to the mortgagor, his heirs, or assigns; "which sale so to be made," it was provided, "shall forever be a perpetual bar, both in law and equity, against the mortgagor, his heirs and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under him, them, or either of them."

Default having been made in the payment of the first instalment, due January 1st, 1860, the mortgagees advertised the premises to be sold on the ensuing 28th of April, and then sold them for the sum of $43,500 to Sloan, to be held by him in trust for the High Shoals Manufacturing Company, the *cestui que trust* of the mortgagees.

At the time of the sale and conveyance to Hovey a down payment was made consisting of $6157 in cash, and a receipt to Bynum by Eben S. Stephenson for certain dividends to which Stephenson was entitled, which, added to the cash, made an aggregate of $7853.33. The bond and mortgage were given to secure the residue of the purchase-money. The bill charges that this payment was made by Olcott and Stephenson jointly; that Hovey was a man of no means, and that he bought and took the title as the agent of the complainant and Stephenson, wholly in trust for them, and that on the 8th day of January, 1860, eight days after the title was conveyed to him, he conveyed to them all his interest in the property, and that on the 18th day of December, 1867, Stephenson conveyed all his interest to the complainant. These allegations, so far as they relate to the agency of Hovey, are clearly proved by the testimony of Hovey himself and of the complainant, and there is nothing in the record which tends in any degree to contradict them. Sufficient evidence was produced in the court below of the execution of the deed from Stephenson to the complainant. The evidence offered as to the deed from Hovey to the complainant and Stephenson consisted of proof of the loss of the original and a certified copy from the proper register's office in North Carolina of a copy which had been registered there.

It was held by the court below that this evidence was incompetent to establish the existence of the lost deed, and that the complainant had therefore failed to show any connection with the property in question. Upon the ground of this objection the bill was dismissed.

Whether this ruling was correct is an inquiry which meets us at the threshold of our examination of the case. It is

one to be determined by the *lex loci rei sitæ*. It is to be considered solely in the light of the statutes and adjudications of North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a local court of that State. In the revised code of 1854 we find the following language. It is a re-enactment of the provision of the act of 1715 on the same subject: "No conveyance for land shall be good and available in law unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall be, within two years after the date of said deed, and all deeds so executed and registered shall be valid and pass estates in land without livery of seizin, attornment, or other ceremony whatever."* Sections three, four, and five of chapter 37, and section two of chapter 21, provide for the execution in other States of deeds for lands in North Carolina and their registration in the proper county; but we have found no provision authorizing the registration of a copy. In *Patton and Erwin's Lessee* v. *Reily*,† in the Supreme Court of Tennessee, an original unregistered deed was offered in evidence. It was objected to upon the ground of the want of registration. The court said: "*Registration* was intended to stand in the place of *livery of seizin*. By the common law no estate could pass without *livery of seizin*, and the same may be said of its substitute. Lands as conveyed by this deed, would not pass the estate at common law, and if it will pass, it must be by act of assembly. The act of 1715 requires the deed to be registered before a legal estate is vested in the grantee. To create a title under this act of assembly, the party claiming the benefit of it must have complied with its requisitions. One of them is that the deed shall be registered. This deed cannot be read in evidence." The plaintiffs were nonsuited. *Patton and Erwin's Lessee* v. *Brown*‡ is to the same effect. Such is the settled law of North Carolina upon the subject.§

* Chapter 37, § 1. † 1 Cook, 125. ‡ Ib. 126.

§ Hogan v. Strayhorn, 65 North Carolina, 279; Ivey v. Granberry, 66 Id. 223; Hodges v. Hodges, 2 Devereux & Battle's Equity, 72.

The original deed from Hovey to Olcott and Stephenson never having been registered, and the registration of the copy being unauthorized, it follows that the certified copy of the registered copy was a nullity, and could give no legal right to the grantees which the Circuit Court could recognize. We hold, therefore, that the ruling upon this subject was correct. Obviously, a proceeding in equity had specially for that purpose, and bringing the proper parties before court, is the appropriate remedy for the complainant to establish the lost deed and give it efficacy, and in no other way can this be done.*

It has been insisted, in behalf of the complainant, that there was a resulting trust in favor of the complainant and Stephenson, arising from the circumstances of the transaction at the time of the conveyance to Hovey.

Where the purchase-money is all paid by one, and the property is conveyed to another, there is a resulting trust in favor of the party paying, unless there be something which takes the case out of the operation of the general rule. But where he furnishes only a part of the amount paid no trust arises unless his part is some definite portion of the whole, and is paid for some aliquot part of the property, as a fourth, a third, or a moiety.† There must be no uncertainty as to the proportion of the property to which the trust extends.‡ Here the amount paid was $7853.33, and it was paid without reference to any specific part of the property. Hence the principle in question does not apply. But if it did, it could do so only to the extent of the actual payment. It could certainly have no application in respect to the $40,000, for which Hovey gave his obligation, and for which Olcott and Stephenson assumed no liability to the grantors of the estate. Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after-advances or funds subsequently furnished. It does not arise upon subsequent

* Hodges v. Hodges, *supra*.

† White v. Carpenter, 2 Paige, 241; Sayre v. Townsend, 15 Wendell, 650.

‡ Baker v. Vining, 30 Maine, 127.

payments under a contract by another to purchase.* A trust to the extent of the payment made, if it existed, would not support the case made in the bill. The complainant claims to have owned the entire estate.

But the bill sets out clearly and fully a case of express trust, and if the seventh section of the Statute of Frauds applied, the trust would be sufficiently "manifested and proved" by the deposition of Hovey, to give it effect.† But there is no such statutory provision in North Carolina, and the case stands in this aspect as it would at the common law, before the enactment of the 29th Car. II, c. 3.‡

This brings us to the examination of the merits of the case. The objections taken by the complainant to the sale to Sloan may be thus stated and grouped together:

That the entire property was sold wholly for cash when only a part of the debt was due; that Bynum and Grier bought in the property for themselves; that it was a case of trustees buying for themselves;

And that the sale was made in gross disregard of the interests of the complainant in the following particulars:

Only enough of the property should have been sold to pay the instalment then due;

If the whole were sold it should have been for cash, only to the extent of the amount due, and with credits maturing respectively, so as to meet the instalments of the debt, underdue, at their maturity;

The place of sale was improper.

The business was conducted by the defendant Bynum. He appears well in the record. No imputation of bad faith has been cast upon him, and no ground for any is disclosed. He conducted himself with integrity and frankness, and mingled kindness with the administration of his trust, as far as his duty to his principals would permit. The first instal-

* Buck v. Swazey & Darling, 35 Maine, 51; Conner v. Lewis, 4 Shepley, 274.

† Brown on the Statute of Frauds, 94; Tiffany on Trusts and Trustees, 191; Pinney v. Fellows, 15 Vermont, 525; Seaman v. Cook, 14 Illinois, 503.

‡ Foy v. Foy, 2 Haywood, 131.

ment matured on the 1st of January, 1860. He waited until February trying to get payment without a sale. Meeting with no success, and seeing no prospect of such a result, he advertised the property to be sold in March. Olcott and Stephenson, by their letter of the 25th of February, asked delay until the 1st of May, hoping to be able in the meantime to raise the funds necessary to discharge the amount due. Bynum's absence on the 1st of May being necessary, he gave them until the 28th of April. With this they were content, and asked no further indulgence. Failing to realize their expectations, the property was exposed to sale upon the premises on the appointed day. Bynum procured several capitalists to attend, but none of them would bid more than $35,000, deeming that to be as much as the property was worth. A meeting of the stockholders of the High Shoals Company had been held, and decided not to allow the property to be sold for less than the amount of the debt due on the bond of Hovey, and appointed and instructed Sloan to bid accordingly. He did so bid, and the sale was made to him, as before stated. A deed was not executed until the 12th of June, 1868. It was operative by relation from the time of the sale. But the deed is an immaterial fact. If the sale were valid, it is conclusive without the deed. If it were invalid, the deed cannot help it. It cannot be doubted that Olcott and Stephenson, when their letter of the 25th of February, 1860, was written, knew the property was to be sold as they had bought it, *en masse*, and making no objection, they are concluded upon that point.* The complainant visited North Carolina in the spring of 1861. While there he made no objection to the sale, either to Sloan or Bynum. On the contrary, in conversation with both, he expressly acquiesced and admitted its fairness and validity. He proposed to Sloan to join him in a new purchase of the property. He applied to Bynum for license for a year to himself and Muir, to enable them to search for mines. Bynum gave him one running from April to November, but

* Lamb *v.* Goodwin, 10 Iredell, 320.

subject to be revoked at any time upon the sale of the premises. It does not appear that the complainant set up any claim touching the property after the sale, until about the time of the filing of this bill, on the 22d of April, 1868. These are significant and important facts in the case.*

The place of sale, like the time of advertising, is not prescribed in the mortgage. Both are left to the discretion of the mortgagees. There is no complaint as to the latter. We are satisfied there was no abuse as to the former. The testimony leaves no doubt in our minds that the property would not have brought more if offered elsewhere. Express authority is given to sell all the property upon the failure to pay either of the instalments at maturity. If enough of it to satisfy the amount due could be segregated and sold without injury to the residue, it would have been the duty of the mortgagees so to sell. The evidence convinces us that the sale of a parcel could not have been made without such injury. It was bought by Groot from the High Shoals Manufacturing Company entire. It was sold entire to Hovey under the mortgage of Groot. It was so sold to Sloan under the mortgage of Hovey. Subsequently it was so sold to Bridgers and others, and it was so sold by them to Commodore Wilkes. This shows the views upon the subject of those most conversant with the property and most interested in disposing of it to the best advantage. It has upon it water-power, timber, ores, mills, and furnaces; each part is necessary to every other. Dismemberment, instead of increasing, would have lessened the aggregate value. It could not have been sold in parcels without a sacrifice.

If a mortgage provide that upon default in the payment when due of a part of the amount secured the whole shall become due and may be collected, such a stipulation is valid and may be enforced.†

So where a bond contains such a stipulation it may be enforced accordingly in an action at law.‡ But the bond in this case as recited in the mortgage contained no such stipu-

* Veazie v. Williams, 8 Story, 621. † Noonan v. Lee, 2 Black, 509.
‡ James v. Thomas, 5 Barnewall & Adolphus, 40.

lation. On the contrary the mortgage, while it authorized a sale of the entire property in the event of any default, expressly provided that if there should be a sale, the amount "then due," with costs and charges, should be retained, and the overplus, if any, paid over "unto the party of the first part, his heirs, administrators, or assigns." Such a clause has not the effect to make the entire debt due and collectible upon the first default.* But the property being incapable of division without injury, and having all been properly sold together, yielded a fund sufficient to pay the whole debt, as well the instalments underdue as the one overdue. Under these circumstances it was proper at once to pay the former as well as the latter, stop the interest, and extinguish the entire liability. The lien of the mortgage continued upon the fund as it subsisted upon the premises before they were sold.† If a court of chancery had administered the fund it would have so applied it. Such is the settled rule in equity.‡ Here the mortgagees, having applied the fund as a court of equity would have applied it in conformity to this principle, there is no ground for complaint on the part of Olcott. Where there is a power and discretion, such as existed in this case, touching the sale, a court of equity will interpose only on the ground of bad faith.§

The bid of Sloan was a liberal one. The property could, doubtless, have been bought in for much less. That bid and the cancellation of the entire debt were in consistency with the fair dealing which characterized the conduct of the mortgagees in all their transactions with the other parties. There is no foundation for the imputation that Bynum and Grier were themselves the purchasers. They had no authority to give credit for any part of the purchase-money. It was their duty to sell wholly for cash. They were au-

* Holden v. Gilbert, 7 Paige, 208.

† Astor v. Miller, 2 Paige, 78; Sweet v. Jacocks, 6 Id. 355.

‡ Salmon v. Clagett, 3 Bland's Chancery, 179; Peyton v. Ayres, 2 Maryland Chancery, 67; King v. Longworth, 7 Ohio Rep., pt. 2, 232; Campbell v. MaComb, 4 Johnson's Chancery, 534.

§ Bunner v. Storm, 1 Sandford's Chancery, 360; Champlin v. Champlin, 3 Edwards's Chancery, 577.

Statement of the case.

thorized to sell, without the intervention of a court of equity.* The property when sold under the mortgage of Hovey was hastening to decay. When he bought, it rented for $5000 per year. When Sloan bought, its condition was such that it could be rented for only $500.

When this bill was filed nearly eight years had elapsed since the sale was made to Sloan. Making allowance for the difficulty of intercourse between the North and the South during the war, there was acquiescence, express and implied, for three years after the war ceased. This, if not conclusive, weighs heavily against the complainant. We see no reason to disturb the decree. This conclusion has rendered it unnecessary to consider so much of the record as relates to R. R. Bridgers and his associates and their vendee, Commodore Wilkes. We have given no thought to that part of the case.

DECREE AFFIRMED.

Justices MILLER, FIELD, and STRONG were absent.

EX PARTE WARMOUTH.

1. Where the Circuit Court of the United States proceeds to exercise jurisdiction under the twenty-third section of the act of 31st May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," an appeal will lie to this court from its final decree.
2. This court has no power to issue the writ of prohibition in such a cause until such appeal is taken.

SUR application of H. C. Warmouth, for a prohibition to the circuit judge for the district of Louisiana.

The application now made was filed December 10th, 1872, based on a bill (and the proceedings under it) which had

* Demarest and Wife v. Wynkoop, 3 Johnson's Chancery, 184.

been filed November 16th, 1872, on the equity side of the Circuit Court for the district of Louisiana, wherein one Kellogg was complainant, and Warmouth, Wharton, Hatch, Da Ponté, McEnery, and the New Orleans Republican Printing Company, defendants; all the parties being averred to be citizens of Louisiana.

That bill averred that in November, 1872, an election was held for governor and lieutenant-governor, as well as for officers of the executive, judicial, and legislative departments; that the complainant and one McEnery were opposing candidates for governor; that at the election no one was enabled to vote who had not been registered: that Warmouth had appointed supervisors of registration with the fraudulent intent of preventing persons entitled to vote from being registered, and that in fact a large number, estimated at ten thousand, were on frivolous pretences prevented from being registered, and were thus prevented from voting for Kellogg, the complainant; that Warmouth, combining with the supervisors and assistants, had caused a false count to be made of the votes, and given untrue returns and certificates of election; that in counting the votes and issuing certificates he had not complied with the law of the State; that he had illegally appointed Wharton secretary of state, and with him elected Hatch and Da Ponté members of the returning board; that it was the intention of this board to make a pretended canvass of the votes, so as to exclude from the count the votes of persons of color prevented from being cast, and thus to deliver to the pretended secretary of state such certificate of result as to make it appear that the said McEnery was elected, which would embarrass and delay him in the prosecution of legal proceedings in the said Circuit Court; that he believed it to be the intention of Warmouth to mutilate the said certificates and returns, and that they should be preserved for proper action when the time for such action shall arrive.

The bill then prayed for an injunction, restraining the defendants from canvassing any return or certificate, or sub-

mitting the same to the pretended board, composed of Wharton, Hatch, and Da Ponté.

That an injunction issue to McEnery, prohibiting him from acting as governor, or setting up any claim to the office.

That an injunction also issue to the New Orleans Republican Printing Company, controlling the publication of the New Orleans Republican, restraining it from publishing any notice, statement, or document relating to said election, and emanating from said board.

The bill further prayed that Warmouth deposit with the clerk sworn copies of all the papers relating to the said election, in order that they may be beyond his power of destruction.

Further, that the writ of injunction might be granted in the first instance *pendente lite*, and after due proceedings be made perpetual.

On this bill restraining orders were issued as prayed for, November 17th, 1872, and subsequently, to wit, on 19th of November, 1872, process in contempt for disobeying such orders, and requiring the present petitioner to answer interrogatories as to what he had done as governor of Louisiana on the premises.

In presenting the application now made, it was shown to this court that since the filing of it the said circuit judge had issued the following order:

"In order to prevent the further obstruction of the proceedings in this cause, and further to prevent the violation of the orders of this court to the imminent danger of disturbing the public peace, it is hereby ordered, that the marshal of the United States, for the district of Louisiana, shall forthwith take possession of the building known as the Mechanics' Institute, and occupy the State House for the assembling of the legislature there in the city of New Orleans, and hold the same subject to further order of this court; and meanwhile prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers in contempt and violation of said restraining order. But the marshal is directed to

allow the ingress or egress to and from the public office in said building of persons entitled to the same."

This proceeding by the circuit judge purported to be based on the act of Congress, 31st May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several States of this Union and for other purposes."*

The 2d, 3d, 4th, 5th, 6th, 19th, and 20th sections of the act are intended to preserve the right of the voter. Each relates to a specific wrong against him, and constitutes it a misdemeanor, punishable by fine and imprisonment.

The 23d section gives a remedy to one deprived of his election to any office. The remedy is to consist in "*any appropriate suit or proceeding to recover possession of the office.*"

Messrs. P. Phillips and E. N. Ogden, in behalf of the petitioner; Messrs. Caleb Cushing and M. H. Carpenter, contra. Mr. T. J. Durant, whom the court declined to hear, for the State of Louisiana.

The CHIEF JUSTICE:

We are all of opinion that when a final decree shall be rendered in the Circuit Court in this case, an appeal will lie to this court. We are also of opinion that this court has no jurisdiction in this case to issue a writ of prohibition until an appeal is taken.

MASON v. UNITED STATES.

The United States offered to A. an order for 50,000 muskets on certain terms specified, with an agreement that 100,000 would be received if delivered within a time named. A. accepted the offer, and laid out a large sum of money in getting his works in condition to execute the order, and thus and otherwise was able and ready to execute it. Subsequently to this the War Department appointed a commission to adjust all contracts, orders, and claims on the department in respect to arms, its do-

* 16 Statutes at Large, 140.

Statement of the case.

cision to be final and conclusive as respected the department, as to the validity, execution, and sums due or to become due upon such contracts; and invited all persons interested in such orders to appear before it and be heard respecting their claims. Whether A. came before it did not appear. The commission, however, did, without his consent and against his remonstrance, pass on his case, and reported that the order to him be confirmed to the extent of 80,000 muskets, upon condition that he should execute a bond with sureties for the performance of the contract as thus modified, and upon his failure to execute such bond that the original order should be held null. The bond being prepared and sent to him by the department he executed it. *Held*, that such execution was his voluntary act; and that the original contract for the 100,000 muskets was thus changed and modified.

APPEAL from the Court of Claims; the case being thus:

On the 7th January, 1862, the chief of ordnance, General Ripley, by direction of the Secretary of War, made in writing, on behalf of the government, this offer to one Mason, a manufacturer of arms at Taunton, Massachusetts:

"I offer you an order for 50,000 muskets, with appendages, of the Springfield pattern, on the following terms and conditions, viz.:" [Here followed a variety of minute specifications as to the character of the muskets, and the time when they were to be delivered.]

"It is further directed by the War Department that double the number of arms and appendages, viz., 100,000, will be received, if manufactured at your establishment in Taunton, and delivered within the times before specified for the delivery of the 50,000 arms and appendages. All the other terms and conditions of this order remaining unchanged for the additional 50,000."

On the 20th January, 1862, Mason, in writing, accepted the foregoing order, and his acceptance thereof was received by the chief of ordnance.

Mason immediately proceeded to make changes of machinery in his machine works, and to do whatever was necessary to insure the full and complete performance of the agreement, and was able and willing to perform his agreement according to the terms of it. His expenditures for changing his machine works into an armory, as required

by the agreement, amounted to $75,000, and the profits which he would have made upon the muskets ordered, if he had been allowed to perform, would have amounted to $5.25 per musket.

On the 13th March, 1862, the War Department *ordered*—

"That Joseph Holt and Robert Dale Owen be a special commission to audit and adjust all contracts, orders, and claims on the War Department in respect to arms; their decision to be final and conclusive as respects the department on all questions touching the validity, execution, and sums due or to become due upon such contracts, and upon all other questions arising between contractors and the government upon such contracts.

"That the commission should proceed forthwith to investigate all claims and contracts in respect to arms in the department, or pending settlement and final payment, and adjudicate the same."

The order added:

"All persons interested in such contracts may appear in person, but not by attorney, before said commissioners, and be heard respecting their claims, at such time and place as the commissioners shall appoint. All claims that they may award in favor of shall be promptly paid. No application will be entertained by the department respecting any claim or contract which they shall adjudge to be invalid."

On the 15th of May, 1862, the commission, without the consent and against the remonstrances of the claimant, decided and reported to the chief of ordnance:

"That the order to Mr. Mason be confirmed, subject to all its terms, to the extent of 30,000 muskets, upon condition that he shall, within fifteen days after notice of this decision, execute bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations, for the performance of the contract, as thus modified, resulting from said order and acceptance; and, *upon his failure or refusal to execute such bond, then the said order shall be declared annulled and of no effect.*"

On the 30th of May, 1862, the chief of ordnance trans-

mitted a copy of this decision to Mason, and also the contract and bond contemplated by the commission in its decision, with the request that he would execute and file them within fifteen days after their receipt by him, if he should "accept the order as confirmed by the commission." Mason thereupon executed such written contract, on the 25th day of June, 1862, whereby he contracted and engaged to furnish to the defendants "30,000 muskets of the Springfield pattern." This contract was performed by both the parties, and no other muskets were ever furnished by Mason to the government.

Upon these facts the Court of Claims, as a conclusion of law, decided:

That the original contract between the parties for the purchase and sale of 100,000 Springfield muskets was changed and modified *by the voluntary act of the parties* in the written contract, 25th of June, 1862, and that the petition of the claimant should be dismissed.

From that decree Mason took this appeal.

Mr. Thomas Wilson, for the appellant; Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Parties having claims against the United States for labor or service, or for personal property or materials furnished, which are disputed by the officers authorized to adjust the accounts, may compromise the claim and may accept a smaller sum than the contract price; and where the claimant voluntarily enters into a compromise and accepts a smaller sum and executes a discharge in full for the whole claim, he cannot subsequently recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise.

Mason contracted to manufacture and deliver 50,000 muskets with appendages, of the Springfield pattern. They were to be in all respects identical with the standard rifle-musket made at the National armory, with the regular ap-

pendages, and were to be so constructed as to interchange with that pattern and with each other in all their parts, and they were to be subject to inspection in the same manner as the arms are which are manufactured at the National armory; and the stipulation was that none should be received except such as passed inspection and were approved by the regular inspectors. Deliveries were to be made at the times and in the quantities therein specified, and payments were to be made, in such funds as the Treasury Department should provide, on certificates of inspection and receipt by the inspectors, at the rate of $20 for each arm including appendages. Information was also communicated to the contractor by the War Department that double the number specified in the contract would be received, if manufactured at the contractor's establishment and delivered at the times specified for the delivery of the first 50,000 arms, upon the same terms and conditions as those specified in that contract.

On the 20th of January, 1862, the claimant accepted the offer to manufacture and deliver the second 50,000 muskets and appendages, as proposed in that offer, and duly notified the chief of ordnance of his acceptance of the same in writing. Pursuant to that arrangement the claimant proceeded to make changes in his machine works, and to do whatever was necessary to enable him to perform his agreement, and the Court of Claims finds that he was able and willing to perform the same, and that he expended $75,000 in changing his machine works into an armory for that purpose, and that if he had been allowed to fulfil the agreement his profits would have amounted to $5.25 per musket.

Complaint is made that the officers of the United States prevented the claimant from performing his contract, and it appears that the Secretary of War, on the 13th of March, 1862, by an order of that date, appointed a special commission, consisting of two members, to audit and adjust all orders and claims on the War Department in respect to ordnance arms and ammunition, providing in the same order that their decisions should be final and conclusive upon the department on all questions touching the validity

and execution of the contracts, and the sums due or to become due upon the same, and upon all other questions arising out of the contracts between the contractors and the government. Whether the claimant ever appeared before the commission does not appear, but it does appear that the commissioners, on the 15th of May, in the same year, without the consent and against the remonstrance of the claimant, decided and reported to the chief of ordnance that the contract of the claimant be confirmed, subject to all its terms, to the extent of 30,000 muskets, upon the condition that he, the claimant, shall, within fifteen days after notice of the decision, execute a bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations in such cases, for the performance of the contract as thus modified, and that the contract shall be declared null and of no effect in case he fails or refuses to execute such a bond. Due notice was given of the decision to the claimant, and the chief of ordnance transmitted to him the draft of the contract and bond contemplated by the decision, with the request that he would execute and file the same within fifteen days from their receipt *if he should accept the contract as confirmed by the commission*, and the finding of the Court of Claims shows that he executed the written contract whereby he contracted and engaged to furnish to the United States 30,000 muskets of the Springfield pattern; and the Court of Claims also finds that the contract was performed by both parties, and that no other muskets were ever furnished to the United States by the claimant.

Much discussion of the case is certainly unnecessary, as it is as clear as any proposition of fact well can be, that the claimant voluntarily accepted the modification of the contract as suggested by the commissioners, and that he executed the new contract in its place, which he must have understood was intended to define the obligations of both parties. His counsel suggest that he accepted the new contract without relinquishing his claim for damages, arising from the refusal of the United States to allow him to fur-

nish the whole 100,000 muskets, but the court is unable to adopt that theory, as it is quite clear that he could not have acted with any such motives consistent with good faith towards the War Department, as he must have known that the chief of ordnance supposed when he, the claimant, returned the written contract duly executed, that the whole matter in difference was adjusted to the satisfaction of all concerned. Parties are bound to good faith in their dealings with the United States as well as with individuals, and the court is of the opinion that no party in such a case could be justified, after accepting such a compromise and executing such discharge, in claiming damages for a breach of the prior contract which had been voluntarily modified and surrendered, unless the new contract was accepted under protest or with notice that damages would be claimed for the refusal of the United States to allow the claimant to fulfil the contract which was modified in the new arrangement.

It is contended by the appellant that the case is different in principle from the case of *United States* v. *Adams*,* and the other cases† of a corresponding character decided by this court, and the court is inclined to the same opinion, as it is a plain case of voluntary adjustment between the parties, which all courts hold is final and conclusive. None of those cases proceed upon the ground that such a commission possessed any judicial power to bind the parties by their decision, or to give the decision any conclusive effect. Nor can such a commission compel a claimant to appear before them and litigate his claim, but if he does appear and prosecute it, or subsequently accepts the terms awarded as a final settlement of the controversy, without protest, he must be understood as having precluded himself from further litigation.

Attempt is made in argument to show that the adjustment in this case, so far as the claimant is concerned, was the result of duress, but the charge is wholly unsupported by evi-

* 7 Wallace, 463.

† United States v. Child, 12 Wallace, 232; United States v. Justice, 14 Id. 535.

dence of any kind, except that the United States proposed to annul the old contract if the claimant refused to accept the modification, which is wholly insufficient to establish such a charge.

Apart from that, it is also suggested that the claimant at that time could have no remedy by suit against the United States, as the transaction preceded the passage of the law establishing the Court of Claims. But he might have applied to Congress for relief, as all other claimants were compelled to do from the organization of the government until the law was passed allowing such parties to prosecute suits against the United States.

Duress, if proved, may be a defence to an action, and it would doubtless be sufficient to relieve a party from the effect of compromise which was procured by such means, but the burden of proof to establish the charge, in every such case, is upon the party making it, and if he fails to introduce any such evidence to support it, the presumption is that the charge is without any foundation.* Acceptance from the government of a smaller sum than the one claimed, even in a case where the amount relinquished is large, does not leave the government open to further claim on the ground of duress, if the acceptance was without intimidation and with a full knowledge of all the circumstances; and the case is not changed because the circumstances attending the transaction were such that the claimant was induced from the want of the money to accept the smaller sum in full, which is not proved in this case.†

Examined in any point of view we think the decision of the Court of Claims is correct.

DECREE AFFIRMED.

The CHIEF JUSTICE, dissenting:

I am unable to concur in the opinion just read. The original contract was honestly and fairly made without taint of

* United States v. Hodson, 10 Wallace, 409; Brown v. Pierce, 7 Id. 214; Baker v. Morton, 12 Id. 157.

† United States v. Child, 12 Wallace, 232.

fraud. This is not disputed. Large preparation at great expense was made by the claimant for the fulfilment of it on his part. It was violated by the United States without reasonable cause, as I think, as expressly found by the Court of Claims, without the consent, and against the remonstrances of the claimant. A modified contract, so called, but really a second contract, was then made between the parties, which was fulfilled on both sides; but there is nothing to show that this contract was freely made, or made at all by the claimant in place of the first, or that payment of the sums due under it from the United States was accepted by him in satisfaction of damages for the breach of the first. I think that the United States are not absolved in their dealings with citizens from the obligations of honesty by which individuals are usually controlled, and that the claimant is entitled to damages.

[See the case next following.]

SWEENY v. UNITED STATES.

The doctrine of *United States* v. *Clyde* (13 Wallace, 35), of *Mason* v. *United States* (*supra*, p. 67), and of other cases, affirmed, and the doctrine redeclared and applied, that where a claim is disputed by the government, and the claimant accepts a certain sum in settlement thereof and gives a receipt in full therefor, it is a bar to a subsequent action in the Court of Claims for any residue asserted to be due.

APPEAL from the Court of Claims; the case being thus:

One Sweeny, owner of a steamer, chartered her at Louisville, March 3d, 1863, to the United States (the assistant quartermaster of the military department where she was, signing the charter-party in behalf of the government), at $175 per day; no term of service being specified. On the 10th the *per diem* was increased, in writing, to $200, and was

so paid till the 20th March. In that month she was ordered and went into another military department; and came under the control of an assistant quartermaster at St. Louis, Captain Parsons, under whose control she remained till the 17th of September, when she was discharged.

It was not conceded by Captain Parsons that the steamer was retained in the service under the charter-party. On the contrary, her account was stated by him on the 15th of September, 1863 (running from the 21st of March to the 31st of July, 1863), at $140 a day. This account was paid by him, and receipted for by the owner of the boat on the 22d of October following. Subsequent accounts for subsequent services were also stated and paid by Captain Parsons, and receipted for by the owners of the boat, none of which accounts or receipts referred in terms to any charter-party. The owner remonstrated at the rate allowed, and, on the 19th of December, 1863, a settlement was made with him by Captain Parsons, by allowing to him, from the 21st of March to the 31st of August, $5 per day, which amount was received and receipted for by the claimant, "*as in full of the above account,*" *being the account for the steamer's services.*

But no release under seal was executed by the claimant, nor was any other consideration given by the government than that expressed of $5 per day for the term named.

Sweeny now filed a petition in the Court of Claims, asking for compensation at the charter rate of $200 per day for the one hundred and eighty-one days, between the 20th of March and the 17th of September.

The Court of Claims dismissed the petition on the ground that the demand of the claimant was a doubtful and disputed claim, which might be the subject of a valid parol compromise, and that the payment of the $5 a day for the term named, constituted a valid and binding compromise, which barred the claimant's action. From this action of the Court of Claims the owner of the vessel appealed.

Mr. James Hughes, for the appellant; Mr. C. H. Hill, Assistant Attorney-General, contra.

Restatement of the case in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Claims against the United States which are disputed by the officers authorized to adjust such accounts may be compromised, and if the claimant voluntarily enters into such a compromise and accepts a smaller sum than the claim and executes a discharge in full for the whole claim he is bound by the adjustment and cannot sue for what he voluntarily relinquished.

Sweeny was the owner of the steamer Ben. Franklin, and on the 3d of March, 1863, he chartered the steamer to the United States for $170 per day, the charter-party being signed by the owner of the steamer and an assistant quartermaster, without any stipulation as to the term of service. He complained of the rate allowed and subsequently applied for an increase, and the quartermaster at St. Louis directed that the steamer should be allowed $200 per day, by an indorsement on the application. She continued under the first contract and was borne upon the returns of the assistant quartermaster for the months of March and April following, but the claimant was only paid at that rate up to the 20th of March, and the steamer was not borne upon the returns of the assistant quartermaster after April of that year. He ordered her to proceed to Milliken's Bend, in the Mississippi River, and in so doing she passed within the limits of another military department, and came under the control of another assistant quartermaster, where she remained until the 17th of September following, when she was discharged.

It was denied by the assistant quartermaster that the steamer was retained in service under the original charter-party, and he stated the account for her services from the 21st of March to the 31st of July, at $140 per day, which was regularly paid by the assistant quartermaster, and was duly receipted for by the claimant, and it appears that none of those accounts or receipts make any reference to the charter-party.

Complaint was made by the owner of the steamer that

the compensation allowed was insufficient, and the assistant quartermaster, on the 19th of December of that year, made a settlement with the claimant and increased the allowance to $145 per day, and the finding of the Court of Claims shows that the account made out in that way was received and receipted by the claimant "as in full of the above account," being the account made out in that way for the services of the steamer.

Enough appears to satisfy the court that the charter-party was superseded, and that the claim was in fact for a *quantum meruit*, and as such that it was the proper subject of compromise within the principle adopted and applied in the case of *Mason* v. *United States*, decided at the present term.* Prior to the adjustment the sum allowed was $140 per day, but that allowance was not satisfactory to the claimant, and the assistant quartermaster, as matter of compromise, agreed to add $5 per day in addition to that allowance, and the claimant having accepted the offer, received the money, and executed a discharge in full of the claim, cannot prosecute a suit in the Court of Claims for what he voluntarily relinquished in the compromise.

Parties may adjust their own disputes, and when they do so voluntarily and understandingly, no appeal lies to the courts to review their mutual decision.

DECREE AFFIRMED.

HARWOOD *v.* RAILROAD COMPANY.

1. Where a bill is filed by a third party to set aside as fraudulent completed judicial proceedings, regular on their face, the plaintiff in those proceedings should be brought in as a party.
2. Where such a bill is filed five years after the judicial proceedings which it is sought to set aside have been completed, the cause of so con-

---

* See *supra*, the preceding case.

siderable a delay should be specifically set out. And if ignorance of the frauds is relied on to excuse the delay it should be shown specifically when knowledge of the fraud was first obtained.

APPEAL from the District Court for the District of Indiana.

Harwood, March, and several other persons, representing that they were stockholders in the Cincinnati and Chicago Railroad, "a corporation now disorganized and unable to sue," filed, *on the 25th of December*, 1865, a bill in the court below against the Air-Line Railroad Company, one Brandt, and several additional persons, to vacate a decree rendered in the same court in the early part of the year 1860, in a suit by George Carlisle as trustee of a second mortgage on the road for the benefit of a certain second issue of bonds, against the said Cincinnati and Chicago Railroad Company. The suit of Carlisle had been for the foreclosure of the said mortgage upon the road, given to secure the second mortgage bonds; and, in form at least, had been regular. The bill in the present case alleged fraud and collusion in that suit between Carlisle and his confederates and certain other persons, who were lessees of the road and in its possession, and who had agreed to pay the interest on its mortgages. It alleged that by the concurrence of these several parties the road had been allowed to lose credit, and that the payment of interest on its second mortgage bonds was wilfully neglected in order that the property might be sold; that this arrangement had been carried out, and that the road had been sold and purchased in by the conspirators for about $25,000, when it was really worth about $2,000,000 above a first mortgage of the same sum to which it was subject; and that the stockholders in the original road were injured by this collusive and fraudulent sale.

The bill prayed that the said alleged collusive and fraudulent sale might be set aside, the complainants and their co-stockholders remitted to their original rights in the former corporation, and permitted to redeem the road from the first mortgage, still upon it.

Carlisle was not made a party defendant to this bill.

By way of showing why their bill was not earlier brought, the complainants alleged that they knew the road was leased out of the power of the company, as they supposed, until 1862, and that they knew that it had been sold as above set forth, except that they were entirely ignorant of the fraudulent acts, arrangements, and combinations by which the sale was brought about and executed; that they trusted in their officers and supposed that all was fairly done; that on the sale the corporation ceased practically to exist, and that the officers industriously concealed from the stockholders the frauds perpetrated, and that these last had no organ to act in the premises; that in 1865 they learned from divers sources (the war having previously directed attention from the matter), that frauds had been perpetrated, but that they did not learn particulars; that the stockholders were scattered in several States, and had to be consulted and measures taken to raise men and money to investigate the transactions; that this was done as expeditiously as disorganized and scattered stockholders could do it, and agents be employed to investigate facts and counsel be consulted.

The defendants demurred. The demurrer was sustained by the court below, and on appeal here the question now was upon the correctness of its said judgment.

Mr. T. A. Hendricks, for the appellant; Messrs. McDonald, Roache, and Walker, contra.

Mr. Justice HUNT delivered the opinion of the court.

We are of opinion that the judgment must be affirmed, for two reasons:

1. Mr. Carlisle, the plaintiff in the suit in which the decree is sought to be vacated, is not a party to this proceeding. In the former suit all the forms of law, at least, were complied with. The parties having interests which it was sought to foreclose were made parties, a decree was taken in the ordinary form that they be foreclosed and that the property be sold. A sale was had under which the present defendants claim title. This was done upon the prayer of

Mr. Carlisle, by his authority, and upon his procurement. Third parties now come into court and ask that all these proceedings, completed according to the forms of law, and sanctioned by the decree of the court, taken at the request of Mr. Carlisle and for which he is responsible, be vacated and declared fraudulent and void. This is sought to be done without his knowledge, and no opportunity is given to him to sustain his decree or to rebut the alleged fraud, and no reason or excuse is given why he is not made a party. This is against authority and principle. No case is cited to justify it, and it is believed that none can be found. The judgments of courts of record would be scarcely worth obtaining if they could be thus lightly thrown aside. The absence of the plaintiff in the original suit is a fatal defect.*

2. We are of the opinion also that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen.†

JUDGMENT AFFIRMED.

* Bowers v. Tallmadge, 16 Howard's Practice Reports, 825, in which the point was decided; Reigal v. Wood, 1 Johnson's Chancery, 402; Wright v. Miller, 8 New York, 1; Thompson v. Graham, 1 Paige, 384; Apthorpe v. Comstock, Hopkins, 143, in which it was assumed.

† Diefendorf v. House, 9 Howard's Practice Reports, 243; The Key City, 14 Wallace, 653.

AVERILL v. SMITH.

Trespass will not lie against a collector of internal revenue for improperly seizing and carrying away goods as forfeited, where, on information afterwards filed the marshal has returned that *he* has seized and attached them, and where after a trial absolving them a certificate of probable cause has been granted under the eighty-ninth section of the act of February 24th, 1807, and where the owner of the goods has never made any claim of the collector for them except by bringing the action of trespass.

The claimant of the goods after a trial where probable cause has been certified, ought to move the court for the necessary orders to cause the property to be returned to the rightful owners, if the court have itself omitted to make such an order. It is not the duty of either the marshal or collector to do so.

ERROR to the Circuit Court for the Northern District of New York.

AN act of Congress of February 24th, 1807,* enacts:

"That when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress, authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment on account of such seizure and prosecution; *provided, that the ship or vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents.*"

The 89th section of the Customs Act of March, 1799,† contains a provision substantially the same.

These statutory provisions being in force, one Smith brought *trespass* against Averill, *a collector of internal revenue*, for taking and carrying away certain barrels of whisky.

The defendant pleaded not guilty, and gave notice, under the practice of the second circuit, of his defences.

* 2 Stat. at Large, 422.

† 1 Id. 696.

The case was tried, and a special verdict found as follows:

"That the defendant, being a collector of internal revenue, on the 4th of February, 1868, seized as forfeited to the United States, and carried away, and deposited in a storehouse at Corning, the whisky mentioned; the same then being in the possession of and owned by the plaintiff; that an information was filed against the same in the District Court of the United States for the said district; that on the 15th of May, 1868, a deputy of the marshal of the district presented to the defendant a process of the said District Court, commanding him, the said marshal, to seize the said property; that the marshal made return that on the 4th of May, 1868, *he* did *seize and attach the said property*, and had duly cited all persons to appear and assert their claims thereto; that he did not at any time notify to the person having possession of, and in whose warehouse the said whisky was stored by the said defendant, that he, the said marshal, had taken possession thereof; that a claim and answer to the said property was put in by Smith, the plaintiff, as owner thereof; that a trial was had and a judgment entered that the property did not become forfeited, but that the same belonged to said Smith, the plaintiff; that afterwards, the said court adjudged and certified that there was probable cause for the said seizure; that the plaintiff had never made claim of the defendant for the said property except by bringing the said action; neither had said property, or any part thereof, ever been returned to the plaintiff, nor had any offer been made to return the same, but that the same still remained in such storehouse at Corning aforesaid."

On this verdict judgment was entered for the plaintiff, and to review that judgment the defendant prosecuted this writ of error.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error:

Upon the facts shown by the special verdict, an action of trespass will not lie against the defendant.

The second resolution in the *Six Carpenters' Case*,* was

* 8 Reports, 146; S. C., 1 Smith's Leading Cases, 216.

"that not doing cannot make the party who has the authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent in arrear, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*." This principle has been universally recognized. In *West* v. *Nibbs*,* it was held "that a landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover." And *Gardner* v. *Campbell*,† *Smith* v. *Egginton*,‡ *Waterbury* v. *Lockwood*,§ *Jacobsohn* v. *Blake*,‖ and other authorities collected and to be seen in the last edition of Smith's Leading Cases,¶ affirm this rule. The certificate of probable cause showed that the original seizure of the goods was lawful, and threw the *onus probandi* upon the claimants.

There was an omission, too, in the judgment of the District Court to make any order in respect of the return of the goods. The goods were not in the possession of the collector. The *marshal* had taken them out of his possession by order of a writ directed to him; and, of course, thenceforth they were in possession of the court. The collector had nothing more to do with them. He could not return them to the plaintiff. The goods being in possession of the court, the plaintiff should himself have come into court and asked to have them back, when he would have received them as of course.

But whatever effect this absence of an order in respect to the return of the goods may have had upon the rights of the parties on the judgment in the District Court, it was necessary for the owner to have taken active measures in some

* 4 Common Bench, 172.
† 15 Johnson, 401.
‡ 7 Adolphus & Ellis, 167.
§ 4 Day, 257.
‖ 6 Manning & Granger, 918, 924.
¶ Seventh edition, vol. 1st, note to The Six Carpenters' Case.

form to recover his property, and to have encountered a refusal; and, without deciding whether he has a remedy in trover or replevin, it is clear on the authorities that the present action will not lie.

Mr. M. W. Cooke, contra:

The case shows a trespass. The defendant, without process, seized, took, and carried away plaintiff's property. The cases cited on the other side, save one, were for acts of officers proceeding upon execution or process of the court. In *Gardner* v. *Campbell*, the defendant took the plaintiff's goods under and by virtue of an execution, and it was decided, simply, that replevin would not lie. This case has no bearing except to show that plaintiff herein could not have replevied the goods if the position of plaintiff in error is correct.

In *Smith* v. *Egginton*, and *Waterbury* v. *Lockwood*, the defendant, an officer, was acting under process of the court directing the seizure of the goods of defendant named in the process. The court seized them. The case of *Jacobsohn* v. *Blake*, so far as it has any bearing, is against the position claimed. The officer there did not seize the goods, and it was upon this ground that the judges decided the case. Tindal, C. J., says:

"In order to maintain such an action (trespass) there must have been an actual seizure of plaintiff's goods."

The goods were simply examined and returned. In the suit at bar they were seized, carried away, and never returned.

The property, when the collector seized it, was put into a warehouse not owned by himself. The marshal attached the property, and gave the proper notices; but he did not remove the property from the warehouse where it was deposited by the collector's order; and, so far as appears from the special verdict, he did not in any way interfere with the possession of it by the warehouseman, as the bailee of the collector.

Assume, however, for the purposes of the argument, that the return of the marshal is conclusive, and that either by the indorsement and delivery to him of the warehouse receipt for the property, or otherwise, he had properly executed his process, and afterwards held the property under legal arrest until it was discharged by the judgment of the District Court.

The question then to be determined is, whether the certificate of reasonable cause, granted by the District Court, is a good defence to this action; as the property seized was never returned or offered to be returned to the owner.

In a case like that complained of here, probable and reasonable cause is confessedly no defence, except where some statute creates and defines the exemption from damages.*

In this case the exemption is claimed under the first section of the act of the 24th of February, 1807, and the eighty-ninth section of the Customs Act of 1799. Now the case of *Hoit* v. *Hook*,† decided in the Supreme Judicial Court of Massachusetts, by Chief Justice Parker, and Justices Thatcher, Putnam, and Wild, in 1817, seems in point.

The property in that case (certain cattle) had been seized and libelled and then sold, *pendente lite*, under the order of the District Court of the United States. After it had been sold the cause was tried, and Hoit, the plaintiff, as the then claimant, had a verdict. The district judge thereupon decreed that the property was not liable to forfeiture; that there was reasonable cause for the seizure; that $384.43 for the expenses which had been incurred for the custody and sustenance of the cattle should be deducted from the proceeds of sale; and that the residue, $151.57, should be paid to the claimant.

A verdict having been taken for the plaintiff in the State court, subject to the opinion of that court, upon the facts stated, the question whether the certificate and decree of the District Court were a defence was argued, and the court decided that the certificate of reasonable cause could operate

* The Apollon, 9 Wheaton, 362, 378. † 14 Massachusetts, 210.

as a bar to an action only when the property was restored, according to the proviso in the statutes above referred to, and ordered judgment for the plaintiff on the verdict.

This case was decided by judges of the highest character for learning and ability.

In the case before us all will agree that it was not the duty of the *marshal* to make return of the property to the claimant; and that the District Court could only require him to release the property from the arrest. But if it were the duty of the marshal to make the return, and the court had power to require him to perform such duty, it would nevertheless be very doubtful whether the marshal's neglect of duty would not prevent the statute from operating as a protection to the defendant. The return of the property forthwith after judgment is a condition precedent to the exemption from liability declared by the statute; and it is clear that it was the intention of Congress that a failure to make such return should fix the liability of the seizing officer. If the marshal neglected his duty to the injury of the seizing officer, the latter must seek his remedy against the marshal; and if any application to the District Court was necessary to secure such return, it was the defendant's duty, and not that of the plaintiff, to take care that such application was made, in order to secure the protection of the statute.

But the marshal had no such duty imposed upon him in this case. The defendant of course was liable to the warehouseman for storage, for which the latter could probably retain the possession of the property—at least as against the defendant—and perhaps as against the plaintiff, and against the marshal after the order or judgment of the District Court that the property should be discharged, and that there was reasonable cause for the seizure.

It is enough to require a citizen, when his goods have been seized and not forfeited, to come into court and establish his title by judgment of the court; and when this has been done, and the party who has committed the admitted and gross wrong is protected by what is called a "certificate

Restatement of the case in the opinion.

of probable cause," it is little enough to require him to return the goods, or procure their return, and especially where they remain under his own personal control, as it can hardly be doubted that they did in this case.

The judgment upon the verdict in favor of the plaintiff was right, and the judgment should be affirmed.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgments rendered in the Circuit Court, in any civil action against a collector or other officer of the revenue, for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him, which shall have been paid into the treasury, may, at the instance of either party, be re-examined and reversed or affirmed in this court upon writ of error, without regard to the sum or value in controversy in such action.*

Certain personal property belonging to the plaintiff, consisting of four hundred and three gallons of whisky and the barrels in which it was contained were seized by the defendant, as the collector of internal revenue for the 27th district of the State, and it appears that such proceedings were had that the district attorney for the district filed an information against the same, in behalf of the United States, founded upon that seizure, in which he alleged that the property was subject to certain duties and taxes which had been duly imposed upon the same, and that the property was found by the defendant, as such collector, in the possession and custody, and within the control of the plaintiff, for the purpose of being sold by him in fraud of the internal revenue laws, and with the design to avoid the payment of the duties and taxes so imposed. Process in due form was issued and the marshal made return upon the same that he had seized and attached the property, and cited all persons to appear and assert their claims, as the process commanded. Subsequently the plaintiff appeared and made claim that he

* 15 Stat. at Large, 44.

was the true *bonâ fide* owner of the property, and filed a claim and answer denying all the material allegations of the information, to which the district attorney replied tendering an issue, upon which the parties went to trial and the jury found that the property did not become forfeited as alleged by the district attorney. Pursuant to the verdict the court rendered judgment in favor of the claimant, and that the property be discharged, and the court also adjudged and certified that there was probable cause for the seizure of the property. Judgment was rendered for the claimant in the District Court on the 21st of August, 1868, and the plaintiff, on the 25th of January of the next year, commenced the present suit, which is an action of trespass, against the defendant, in the State court, wherein the plaintiff alleged that the defendant, on the 4th of February, 1868, being the day the defendant seized the property described in the information, with force and arms, at the place therein named, seized, took, and carried away the described chattels, of the value therein alleged, and that he converted the same to his own use, and still unlawfully detains the same from the plaintiff. Due application was made by the defendant for the removal of the cause from the State court into the Circuit Court, and it was accordingly removed as prayed by the defendant, and he appeared and pleaded the general issue, that he is not guilty in manner and form as the plaintiff has alleged in his complaint. Issue having been joined the cause came to trial, and the jury, under the instructions of the court, returned a verdict for the plaintiff in the sum of $1014.46, "subject to the opinion of the court upon the questions of law arising upon the proof of a certificate of probable cause, and upon the fact of the non-return of the property." Considerable delay ensued, but the case was finally turned into a special verdict, and the court rendered judgment in favor of the plaintiff for the sum found by the jury. Whereupon the defendant sued out the present writ of error and removed the cause into this court.

Trespass certainly will not lie in such a case for the act of

seizure, unless it appears that the act was tortious or unauthorized, neither of which is proved or can properly be presumed in the present case, as the act of seizure was made by the party as the collector of the revenue and in a case where it was his duty to make it if he really believed, what he alleged, that the property was forfeited to the United States. Attempt to sell such property to avoid the payment of the internal revenue duties imposed thereon is a legal cause of forfeiture, and if the defendant, as such collector, had good cause to believe and did believe that the property described in the information was forfeited to the United States by any such attempt of the owner, it was his duty to make the seizure, and inasmuch as the District Court, having jurisdiction of the subject-matter, have adjudged and certified that there was probable cause for the seizure, the court is of the opinion that trespass will not lie for that act.* Nothing of the kind is pretended, even by the plaintiff, but he insists that the decree discharging the property from the attachment made by the marshal, under the process issued by the District Court in pursuance of the prayer contained in the information, made it the duty of the defendant to return the property to him as the lawful claimant, and that inasmuch as the defendant neglected to return the property, he became a trespasser *ab initio;* but the court, in view of the circumstances, is not able to concur in that proposition, for several reasons: (1.) Because it is settled law, and always has been, since the decision in the case of *Vaux* v. *Newman*,† that a mere nonfeasance does not amount to such an abuse of authority as will render the party a trespasser *ab initio.* (2.) Because the District Court, which had jurisdiction of the subject-matter, adjudged and certified that there was probable cause for the seizure of the property. (3.) Because the property was taken out of the possession of the defendant by virtue of the judicial process issued by the District Court, pursuant to the prayer contained in the information, and remained, throughout the litigation, in the custody of the mar-

* United States v. Distilled Spirits, 5 Blatchford, 410. † 8 Coke, 146.

shal as the officer of the court which issued the process. (4.) Because the property under such circumstances, though in the custody of the marshal for safekeeping, is, in contemplation of law, in the possession of the court for adjudication. (5.) Because the plaintiff did not obtain any order from the District Court for a return of the property nor make any demand for the same either of the marshal or of the defendant.

1. Extended argument to show that a mere omission of duty, or neglect to do what another has a right to exact, or any other mere nonfeasance, will not amount to such an abuse of authority as will render the party a trespasser *ab initio*, is quite unnecessary, as the proposition is not controverted, nor can it be, as it is supported by the highest judicial authority. It was resolved in the leading case that not doing a thing cannot make a party a trespasser *ab initio*, because *not doing is no trespass*, and, therefore, if the lessor distrains for his rent and thereupon the lessee tenders him the rent and arrears, and requires his beasts again, and the lessor will not deliver them, this *not doing* cannot make him a trespasser, and that rule was affirmed in the case of *West* v. *Nibbs*,* by the whole court. When an act is legally done, said Spencer, C. J., it cannot be made illegal *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act.†

2. Proof of probable cause, if shown by the certificate of the District Court which rendered the decree discharging the property, is a good defence to an action of trespass brought by the claimant against the collector who made the executive seizure, provided it appears that judicial proceedings were instituted and that the charge against the property was prosecuted to a final judicial determination. Where the respondent prevails in such an information, the court, says

* 4 Manning, Granger, and Scott, 185.

† Gates v. Lounsbury, 20 Johnson, 429; Jacobsohn v. Blake, 6 Manning & Granger, 925; Doolittle v. Blakesley, 4 Day, 265; Shorland v. Govett, 5 Barnewall & Cresswell, 488; Gage v. Reed, 15 Johnson, 403; Waterbury v. Clark, 4 Day, 198; Ferrin v. Symonds, 11 New Hampshire, 363.

Mr. Parsons,* give to the prosecuting or seizing officers a certificate of probable cause, if in their judgment he had such cause for the seizure, and that, he says, protects the officer who made the seizure from prosecution for making the same; and he adds, that the final decree of the court in a case of forfeiture regularly before the court is conclusive. In cases of acquittal in revenue instance causes, says Mr. Dunlap,† the decree is for the restitution of the property in the custody of the court, and a warrant of delivery is immediately issued, but where there is reasonable cause of seizure the judge certifies that fact or causes an entry thereof to be made, which protects the seizing officer from any prosecution for the seizure. Probable cause, he says,‡ means less than evidence which would justify a condemnation; and the same author says, if the court before whom the cause is tried shall cause a certificate or entry to be made that there appeared to be a reasonable cause of seizure, the seizing officer shall be protected from all costs, suits, and actions on account of the seizure and prosecution. Differences of opinion existed for a time as to the legal meaning of the term probable cause, but it is settled that it imports circumstances which warrant suspicion, and that a doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting the fact.§

Property seized under the internal revenue laws, when the same is attached by the marshal under judicial process, remains in his possession and is not in general delivered over to the collector, and in respect to all such property the rule is well established that it is in the custody of the law or of the court, and that it is held by the marshal as the officer of the court.

Goods of a maritime character seized under the principal collection act were at one time required to be put into the custody of the collector, and it is undoubtedly true that in respect to such goods the collector is responsible for the safe

* On Shipping, 491. † Practice, 298. ‡ Ib. 308.

§ Locke v. United States, 7 Cranch, 348; United States v. Riddle, 5 Ib. 313; The George, 1 Mason, 27.

custody of the same to the same extent as the marshal is for such as remain in his possession and keeping, and the rule applied to each alike is that the keeper is responsible for any loss or injury which the goods sustain by his neglect or want of due care.*

Owners of property seized cannot maintain an action for the property pending the proceeding *in rem* to enforce the forfeiture, as it cannot be determined before the final decree, whether the taking be rightful or tortious. Consequently the pendency of the suit *in rem* would be a good plea in abatement, as was decided by this court more than half a century ago.† Two other propositions were decided in that case which are of controlling importance in the present investigation: (1.) That the certificate that there was reasonable cause of seizure would be a good bar to an action commenced after the decree of condemnation. (2.) That the decree of acquittal, if accompanied by a denial of such a certificate, establishes the fact conclusively that the seizure was tortious and that the owner of the property is entitled to his damages for the injury.‡

Where the seizure is made in a case of capture *jure belli* it is conceded that these principles apply without qualification, but it is insisted that probable cause never furnishes a defence to an action for damages in the case of a municipal seizure, except in cases where some act of Congress authorizes the courts to give it that force and effect, and it must be admitted that such is the law as expounded by this court.§ Concede that, but it should be observed that this court in the very case in which that rule is established, refer to the 89th section of the principal collection act, and to the sub-

* 1 Stat. at Large, 678, § 69; Burke v. Trevitt, 1 Mason, 100; Jennings v. Carson, 4 Cranch, 21.

† Gelston v. Hoyt, 3 Wheaton, 246.

‡ Shattuck v. Maley, 1 Washington Circuit Court, 249; United States v. Gay, 2 Gallson, 360; The Friendship, 1 Id. 112; United States v. One Sorrel Horse, 22 Vermont, 656; La Manche, 25 Law Reporter, 585; Wilkins v. Despard, 5 Term, 117; The Ship Recorder, 2 Blatchford, 120; The Malaga, 2 Am. Law Journal, 105; La Jeune Eugenie, 2 Mason, 436.

§ The Apollon, 9 Wheaton, 378; 1 Conklin's Admiralty (2d ed.), 459.

sequent "act respecting seizures," as containing express provisions upon the subject, and the court decides that they show the clear opinion of Congress that the claimant in such a case shall not be entitled to costs, nor shall the person who made the seizure or the prosecution be liable to an action, suit, or judgment on account of such seizure, or prosecution.* Appended to the section enacting such an exemption as exhibited in the first two acts is the following, to wit: "Provided that the ship or vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents." Taken literally, it is quite clear that the language in those provisos, respectively, would require what the defendant in a case like the present could not perform, as he could not compel the court to make an order for the return of the property, nor could he compel the marshal to do what it is insisted the language of the provisos require the defendant to do, but the proviso in the act last referred to is of a very different character, and reads as follows: "Provided such property or articles *as may be held in custody by the defendant, if any,* be, after judgment, forthwith returned to the claimant or claimants, his, her, or their agent or agents." Beyond all doubt the construction which this court put upon the provisos in the first two acts in the case referred to, was the same as the language employed by Congress in the third act imports, and it is believed that such is the construction which has always been given to those two provisos ever since they were enacted.

Imported goods when seized and subsequently attached by the marshal are sometimes deposited with the collector for safe custody, and in respect to such the rule would be a reasonable one which should require him to surrender the same to the owner as soon as the goods are acquitted, but it would be monstrous to deny the collector the benefit to which he would otherwise be entitled from the certificate of

* The Apollon, 9 Wheaton, 373; 1 Stat. at Large, 696; 2 Id. 422; 3 Id. 199.

probable cause, for the reason that he did not return the property which was taken out of his possession by judicial process, and which the law requires the marshal to keep in his custody as the officer of the court having jurisdiction of the controversy.

Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself or a satisfaction out of it, and the executive seizure is required to bring the property within the reach of judicial process and as affording some protection to the owners against the causeless interference of irresponsible persons with their property, but it is merely a preliminary requirement, as the judicial arrest must follow, and the law makes it the duty of the marshal to keep the property seized in such safe and secure manner as to protect it from injury while it is in his custody, so that if it be condemned or be restored to the owner its value to the parties may be unimpaired.* Perishable property may be sold and the proceeds paid into the registry of the court, in which event the proceeds represent the property seized, but it must be obvious that the defendant in that state of the case could not return the proceeds, as money in the registry of the court can only be drawn out of the registry pursuant to the order of the court, signed by the judge and entered and certified of record by the clerk.† Viewed in any light the better opinion is that it is the duty of the claimant to move the court for the necessary orders to cause the property or its proceeds to be returned to the rightful owner.

Reference is made to the case of *Hoit* v. *Hook*,‡ as prescribing a different rule. Suffice it to say in respect to that case that it is one of an exceptional character, and one which is not very satisfactorily explained, but if it is understood as supporting the views of the plaintiff the court here cannot accept the conclusion as applied to the present case.

3. Sufficient proof was exhibited, of the most satisfactory character, showing that the property was attached by the

* Benedict's Admiralty, 262; Pelham v. Rose, 9 Wallace, 103.

† 3 Stat. at Large, 395. ‡ 14 Massachusetts, 210.

marshal, and was by him taken out of the possession of the defendant, and that the defendant never afterwards obtained its possession, which is all that need be said on that subject, as it is quite clear that the defendant could not return property which was in the possession of an officer of the court.

4. Enough has already been remarked to show that the property was in the possession of the court for adjudication, and that it was the appropriate duty of the claimant to move the court that it be restored to the rightful owner.

5. Argument to support the fifth proposition is quite unnecessary, as the special verdict finds that the plaintiff never made claim of the defendant for the property except by bringing the action, which of itself is sufficient to show that the judgment should be reversed.

JUDGMENT REVERSED, and the cause remanded with directions to issue

A NEW VENIRE.

BAILEY v. RAILROAD COMPANY.

A railroad company with stockholders and bondholders, being much embarrassed, put before the latter a plan, by which they should surrender a part of their bonds and receive preferred stock therefor, the same to "be 7 per cent. stock and not cumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent. *upon both* in any one year." The bondholders having accepted the plan, a committee was appointed to "carry out the intention" of it. The committee reported an indenture in form to be signed by the bondholders and the company. The indenture contained this provision: "And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of 7 per cent. from the net earnings of said road in each year, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares in the net earnings of said corporation, beyond SAID 7 per cent., but shall at no time be entitled to an accumulated dividend," &c. The indenture was approved by the stockholders, who ordered it to be executed, and ordered the directors "to procure such certificates in relation to the preferred stock, to be issued under said agreement, as may be necessary to carry the same into effect." In accordance with this the directors issued and gave to the former bondholders certificates which, premising that they were issued in adjustment of bonds, "and subject to the terms and conditions of the indenture," &c., and "with the rights set forth therein," declared that the

Statement of the case.

holder was entitled "to receive all the net earnings of said company, which may be divided pursuant to said indenture, in each year, up to $7 per share. *and to share in any surplus beyond $7 per share, which may be divided upon the common stock.*" Held—

1st. That parol evidence was inadmissible to show how all the parties in interest understood the transaction, from its commencement to its consummation.

2d. That after the preferred stockholders received 7 per cent., the common stockholders were entitled to an equal sum, per cent, before the preferred ones got more.

ERROR to the Circuit Court for Missouri; the case being thus:

The Hannibal and St. Joseph Railroad, in Missouri, with an income of but $450,000, and having a capital stock of $3,000,000, a debt of $8,000,000 of 7 per cent. bonds, and an arrear in interest of $4,000,000—both bonds and interest—secured by mortgage on all the property of the company, found itself, A. D. 1862, in consequence of the then universal depression of values brought about by the rebellion, in such embarrassments that it could neither pay dividends on its stock nor interest on its debt; and as the State of Missouri had a lien of $3,000,000 upon it, which had precedence of every other claim, it became obvious that some vigorous measures of reorganization were necessary if anything was to be saved for either bond creditors or stockholders.

In this state of things, on the 15th of October, 1862, the company issued to the several holders of its bonds a circular entitled, "*A plan for extricating it from its present difficulties, and improving its securities.*" In this plan the company proposed to these several bondholders that they should exchange their bonds in part for other bonds, having a longer time to run, and in part for preferred stock; "the preferred stock to be 7 per cent., and not cumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent., UPON BOTH, in any one year."

Prior to November 24th, 1862, all the bondholders had come into this plan; their assent being signified by an agreement in these words annexed to the plan itself:

"We, the subscribers, owners of bonds issued by the Hanni-

bal and St. Joseph Railroad Company, of the kinds and amounts set opposite our names, respectively, hereby agree to surrender the same and receive in exchange therefor new bonds and preferred stock, *in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities, dated 15th October*, 1862, *and hereunto annexed.*"

On the same 24th of November, 1862, the board of directors of the road

"Voted, that Messrs. Bartlett, Thayer, and Hunnewell be, and they are hereby appointed a committee with power to carry out the *intention* of the circular of October 15th, 1862, entitled 'A plan for extricating it from its present difficulties and improving its securities,' and that they are authorized to make such expenditures therefor as to them may seem discreet."

This committee, in discharge of the duties of their appointment, reported an "indenture" to be executed by the company on the one hand, and the bondholders or the trustees of the mortgage on the other, which, after referring to the embarrassments of the company, went on to give effect to the plan; though no reference was anywhere made in the instrument to this agreement itself. The indenture contained this clause:

"And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of 7 per cent. from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares in the net earnings of said corporation beyond SAID 7 per cent., but in no case to be entitled to an accumulated dividend (in case a dividend shall fail to be made in any one or more years, or, if made, be insufficient to pay said 7 per cent.) in any subsequent division of said net earnings, but shall be entitled only in that event to SAID 7 per cent., and to share in said surplus earnings as aforesaid."

On the 1st April, 1863, this form of indenture being laid before the board of directors, was by it referred to a stock-

holders' meeting to be held on the 30th May, 1863. At this meeting the board of directors were

"Instructed to procure and adopt, on behalf of the corporation, such certificates in relation to the preferred stock, *to be issued under said agreement, as may be necessary to carry the same into effect*, and cause the same to be executed in behalf of this corporation in such manner as they may think best."

Under this authority the indenture was accordingly executed by Mr. W. H. Swift and others, trustees for the bondholders, on the one part, and the company on the other; and the directors, on the 26th June, 1863, prepared and adopted a form of certificate thus:*

NUMBER.] STATE OF MISSOURI. [SHARES.

Hannibal and St. Joseph Railroad Company.

PREFERRED STOCK. } SHARES $100 EACH. { SEVEN PER CENT.

Issued in adjustment of the bonds of said company, . . . and *subject to the terms and conditions of an indenture* between said corporation and W. H. Swift and others, trustees, dated April 1st, 1863, *and with the rights set forth therein*, and may be transferred upon the books of the company and new certificates issued, and may be used, with the bonds of said company bearing date April 1st, 1863, in the purchase of its lands, as provided in said indenture.

The Hannibal and St. Joseph Railroad Company hereby certifies that, in consideration of the surrender and placing in trust of bonds and coupons in pursuance of said indenture, ... is entitled to ..... shares of the preferred stock of said corporation, and to receive all the net earnings of said company which may be divided pursuant to said indenture in each year, up to $7 per share, *and to share in any surplus beyond $7 per share which may be divided upon the common stock.*

WITNESS the seal of the corporation and the signatures of the transfer agent and of one of the directors, at Boston, Mass., the ..... day of ....., A. D. 186 .

.....

Transfer Agent.

Certificates were made out accordingly in this form, and

* Prior certificates in the same form, only conditioned upon the procuring of legislation supposed to be requisite, had been issued, and the legislation having been obtained were recalled, and superseded by new ones in the form given in the text.

given to the bondholders, who received them without any expressed exception to their tenor.

In January, 1870, the company had so far retrieved its disasters as to declare a dividend of 7 per cent. on the preferred stock. Having yet a surplus it made a dividend of 3½ per cent. of it to the common or unpreferred stock, to the exclusion of the preferred stock, and was about to make another dividend of 3½ per cent. in the same way.

Hereupon one Bailey, owner of several shares of the preferred stock, filed a bill, annexing the indenture and form of certificate, but not the plan, as exhibits, to enjoin this further dividend on the unpreferred stock, and to have it appropriated to the preferred stock.

The defendants answered the bill, annexing the plan and form of certificate, but not the indenture, as exhibits, and contending that on a true construction of the documents in the case no such appropriation ought to be made; and on the hearing they introduced, against the objection of the plaintiff, the evidence of persons who had prepared the indenture, that it was drawn with the purpose of giving effect to the plan, and that from the commencement of the transaction to its conclusion parties concerned understood the transaction as they, the defendants, alleged it when rightly construed to be.

The court dismissed the bill and the complainant appealed.

Messrs. Glover and Shepley, for the appellant:

1. The evidence as to how parties *other* than Bailey understood the arrangement was so palpably improper that we spend no time in arguing the point that it was so.

2. The *indenture* is the contract, and the only contract in the case. All preceding suggestions and propositions were merged in this more solemn instrument. Now, the words "*said* 7 per cent." in it show that the meaning of the parties was that the holders of the preferred stock should equally share in any dividend which might be declared from the net earnings beyond "the *said* 7 per cent.," which by the terms

of the indenture was first to be set apart for a dividend upon the preferred stock.

3. There is nothing in the concluding language of the certificate opposed to this idea. Contrariwise, that language accords with the idea. When, after speaking of the dividend of $7 per share to be applied as a dividend upon the preferred stock, the sentence continues "and to share in any surplus beyond $7 per share," it has reference to the surplus remaining after the $7 had been applied to the payment of a dividend of that amount on the preferred stock. At best the language is doubtful, and as the certificate on its face declares that it is issued "subject to the terms and conditions of the indenture," and "with the rights *therein* set forth," the doubt must be cleared up by the plain language of the solemn and fundamental instrument of the contract. Nay, if the concluding language of the certificate were opposed to Bailey's claim he would have a right to have the certificate reformed, according to the indenture to whose "terms and conditions" it declares that it is issued. The indenture does not state that it is made in pursuance of execution of the plan, or even so much as refer to it.

The fact is that the defendants, to overturn our claim, have to reconstruct the whole contract. They have to add to the sentence a new phrase, containing a new idea, as thus:

"And to an equal dividend with said other shares in the net earnings of said corporation beyond said 7 per cent., *after an equal dividend shall have been next declared upon the said unpreferred stock.*"

Messrs. T. T. Gantt and J. Carr, contra:

There is a radical defect in the argument of the opposing counsel in supposing that the indenture is the fundamental contract. The *plan*, which was so specifically assented to by the bondholders as that their assent is on a paper appended to it, is the basis of everything. The indenture was undoubtedly prepared and executed to carry *it* out, and if giving rights varying from it, might be reformed by *it*. Now,

by the plan, the 7 per cent. is to be "not cumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent. *upon both* in any one year." This language is fatal to the complainant's case.

The word "said," which makes the complainant's strongest point, is exceedingly apt, even in carefully drawn documents, to be inadvertently repeated. In this case, unlike most cases, the inadvertence somewhat affects the meaning. But all the documents form part of one transaction, and of course are to be taken together. The indenture is to be read by the light of the plan which preceded and the certificate which followed it. The maxim of the law is, "*Ex antecedentibus et consequentibus optima fit interpretatio.*" And when we look at the plan submitted, the circumstances under which the committee which drafted the indenture was appointed, the agreement with the bondholders which the committee was instructed to embody and carry out, the action of the directors upon the indenture, the reference of the question of its adoption to a stockholders' meeting, the guarded terms of the resolution then passed, and, finally, the definition unequivocally given, of the nature of the preferred stock by both the corporation and its bondholders, by the form of the certificate adopted, all doubt vanishes as to the construction which must be placed on *all* the documents.

To all this may be added, though it is unnecessary, the concurrent testimony of persons who prepared the indenture and other parties concerned in the matter; a sort of testimony not, we think, improper, and which, if received, is in its nature strong.

Mr. Justice CLIFFORD delivered the opinion of the court.

Certificates of stock, described in the bill of complaint as common or unpreferred stock, amounting to $3,000,000, were issued by the respondents, divided into shares of one hundred dollars each, which constituted their capital stock. Pecuniary obligations were contracted by the company in constructing the road, much beyond their means of payment, which consisted of three classes of bonds, issued by

the company at different times, in aid of the construction and equipment of the road, and which were secured by three several mortgages, and were known as land bonds, convertible bonds, and second mortgage bonds. Embarrassment necessarily ensued, as the stock of the company had become of no value in the market, and as the respondents were unable to pay the interest on their bonds or to make any dividends, they issued to the holders of the bonds a circular or plan for extricating the company from their difficulties and for improving their securities. By that plan they proposed to the several holders of the bonds that they should exchange the same in part for other bonds and in part for preferred stock of such a nature that its holders should have the right to receive "7 per cent., not cumulative, but to share with the common stock any surplus which may be carried over and above 7 per cent. *upon both* in any one year." Measures were adopted to send that circular to all the holders of the bonds, and it appears that a large majority of the bondholders approved and accepted the terms and conditions of the proposed arrangement, and as evidence thereof signed an instrument by which they agreed to surrender the mortgage bonds which they held, and receive, in exchange therefor, new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from its present difficulties and for improving their securities; that the respondents thereupon appointed a committee with power to carry it into effect; that the committee prepared an indenture to accomplish that end; that they subsequently, by order of the directors, submitted the same to a meeting of the stockholders convened for that purpose, and that the stockholders did then and there accept and ratify the action of the directors and of the committee and ordered that the indenture should be duly executed and delivered. Authority was also conferred upon the directors, at the same meeting, to adopt, in behalf of the company, such certificates in relation to the preferred stock to be issued under the agreement "as may be necessary to carry the same into effect," and to cause the same to be executed,

in behalf of the company, as they may think best. They, the directors, accordingly prepared and adopted, in behalf of the company, the form in which all of the certificates of the preferred stock were for a time issued by the respondents, which contains the recital that the holder "shall be entitled to receive all the net earnings of said company which may be divided pursuant to said indenture in each year, up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock." Certificates of preferred stock were issued in that form until the legislature passed the act authorizing the company to convert their bonds secured by mortgage into preferred stock, when the certificates issued in that form were recalled and a new form was adopted, but inasmuch as it contains the same provision in respect to the right of the holder to participate in the yearly net earnings of the company it need not be reproduced, except to say that the certificates in the second form, as well as in the first, purport, on their face, to be issued subject to the terms and conditions of the indenture between the company and the trustees, which the stockholders directed should be executed and delivered to carry the plan sent to the bondholders into effect. Pursuant to that order it was executed, and it contains the following provision: "That said preferred stock shall be entitled to a dividend of 7½ per cent. from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares of the net earnings of the company beyond said 7 per cent., but shall at no time be entitled to an accumulated dividend in any subsequent division of said net earnings." Eight hundred shares of the preferred stock are owned by the complainant, and he filed the bill of complaint claiming that by the true construction of the indenture the preferred stock is entitled, not only to a dividend of 7 per cent. from the net earnings of the road in each year, before any dividend is declared in favor of the unpreferred stock, but also to an equal dividend with the unpreferred

stock in the net earnings of the same year beyond the amount required to discharge the dividend of 7 per cent. secured to the preferred stock.

Shares of the preferred stock, it is conceded, are entitled to a dividend of 7 per cent. from the net earnings of the road in each year whenever a dividend of net earnings is made, before any dividend can be claimed for the shares of the unpreferred stock, as that is a matter of priority created by the indenture, but it is insisted by the respondents that the priority does not extend beyond the 7 per cent., that when that priority is satisfied the preferred stock is not entitled to any further dividend in that year until the unpreferred stock shall receive a 7 per cent. dividend from the net earnings of the road in the same year.

Ten and a half per cent. net having been earned by the road in one year, the directors, adopting the views of the respondents, made a dividend of 7 per cent. upon the preferred stock, and having satisfied that priority, they made a dividend of 3½ per cent. from the residue of the net earnings beyond the 7 per cent. upon the unpreferred stock, and the complainant insisting that the fund of 3½ per cent. was to be shared equally between the preferred and the unpreferred stock, filed the present bill of complaint and prayed for an injunction to restrain the company from paying any such dividend upon the unpreferred stock. Proofs were taken and the parties having been heard the court entered a decree for the respondents, dismissing the bill of complaint.

Evidence was introduced showing that all the parties understood the transaction, from its commencement to its final consummation, as it is understood by the respondents, but it is insisted by the complainant that such evidence is inadmissible, as its tendency is to explain and qualify what is in writing, and the court is inclined to concur with the complainant in that proposition. Such evidence cannot be admitted in the case except for the purpose of connecting the several written instruments together, and of showing that

they are all parts of one transaction; nor is it admitted that the evidence is necessary in this case, even for that purpose, as the instruments themselves contain the most persuasive evidence to establish that fact, and inasmuch as it appears that they were all introduced, either by the complainant or by the respondents, without objection, they are properly before the court. Such being the fact it is quite clear that they must all be regarded as instruments *in pari materia*, and that as such they are the proper subjects of consideration in order to ascertain and determine what is the true nature of the transaction and the true construction of the contract between the parties. All of these writings were executed as means to the same end, which was to enable the company to find relief from the impending dangers and great embarrassments with which they and all interested in their affairs were surrounded. They could command nothing, nor were the bondholders in much better condition, as a foreclosure would not, in all probability, accomplish much except to sacrifice the interests of all concerned. Everything connected with the enterprise was in jeopardy except the interest of the State, whose loan of $3,000,000 was secured by a first mortgage, covering the franchise, road-bed, and all the rolling stock of the company, whose lands, franchise, road-bed, and other property were also incumbered by the other three mortgages before mentioned, amounting to $8,000,000.

No attempt was made to negotiate with the State, but the relief sought was obtained by the arrangement with the holders of the bonds issued by the company, and which were secured by the three mortgages aforesaid which were subject to the mortgage given to the State, as follows: (1.) Holders of bonds under the first of the three mortgages were to surrender 30 per cent. of their bonds and all their unpaid coupons, and to accept preferred stock for the amount. (2.) Persons holding bonds under the second mortgage were to surrender 40 per cent. of their bonds and all their unpaid coupons, and they were to accept preferred stock as stipulated in the indenture. (3) Those holding bonds under the third mortgage were to surrender the whole of their bonds

and unpaid coupons, and were to accept preferred stock for both bonds and coupons.

Priority was thus secured by the bondholders over the unpreferred stock amounting to a lien, as against the holders of the latter stock, for a yearly dividend of 7 per cent., if the net earnings of the road were sufficient for that purpose, as conceded by both parties. Prior stockholders yielded them that preference, but they insist that no just construction of the contract will give them any more in any one year until the net earnings of the road will also give to the holders of the unpreferred stock a dividend for the same amount, and the court is inclined to adopt the same conclusion.

Test the question by the circular addressed to the bondholders, which they all signed as the preliminary step to the arrangement, and the inquiry is too clear for argument, as the statement is that the preferred stock shall "be 7 per cent., not cumulative, but to share with the common stock any surplus which may be carried over and above 7 per cent. *upon both* in any one year," which means, as plainly as language can express the idea, that the preferred stock shall share in the surplus arising from the net earnings of the company, in any one year, beyond what is necessary to pay a dividend to the whole stock, preferred and unpreferred, of 7 per cent. Nothing more favorable could be expected by the bondholders, as they signed the circular and agreed to surrender the number of bonds set against their respective names and to receive in exchange therefor new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from their present difficulties and for improving their securities, showing that their attention had been called to the plan and that they were satisfied with its terms and conditions.* Beyond doubt the directors understood the matter in the same way, as they invested the committee, which they appointed, with the power to make such expenditures as to them should seem discreet to carry

* Sturge v. Railway, 7 De Gex, Macnaghten & Gordon, 158.

out the plan, which was sent to all the bondholders for their approval.

Suppose that is so, still it is insisted that the indenture is the only evidence of the contract between the parties, but it is too late to advance that proposition, as all the other instruments are before the court without objection, and several of them were introduced by the complainant as exhibits to the bill of complaint. Seasonable objections, however, could not have availed the complainant if they had been made, as it is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject-matter may be read together as forming parts of one transaction, nor is it necessary that the instruments should in terms refer to each other if in point of fact they are parts of a single transaction.* Until it appears that the several writings are parts of a single transaction, either from the writings themselves or by extrinsic evidence, the case is not brought within the rule, as it may be that the same parties may have had more than one transaction in one day of the same general nature. Doubt upon that subject, however, cannot arise in this case, as the due relation of the several writings to each other is conceded by both parties.†

Standing alone it may be admitted that the indenture furnishes some support to the views of the complainant, but it is clear that all ambiguity disappears when it is read in connection with the writings which preceded and followed it in respect to the same subject-matter. Ample justification for that remark is found in the plan which preceded it and which was approved and signed by all the bondholders, and in the form prepared for the certificate of the preferred stock which was adopted subsequently to the execution of the indenture, and which was accepted by all the holders of the

* Cornell v. Todd, 2 Denio, 133; Jackson v Dunsbagh, 1 Johnson's Cases, 91; Stow v. Tiftt, 15 Johnson, 463; Railroad v. Crocker, 29 Vermont, 542; Sturge v. Railway, 7 De Gex, Macnaghten & Gordon, 158; Jackson v. McKenny, 3 Wendell, 233; Hull v. Adams, 1 Hill, 601.

† Cornell v. Todd, 2 Denio, 133.

preferred stock as a complete fulfilment of the arrangement between them and the company. Holders of preferred stock, as there provided, are entitled to receive all the net earnings of the company which may be divided pursuant to the indenture in each year up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock, which in substance and legal effect is the same regulation as that contained in the circular or plan, and all the other writings upon the subject which were given in evidence at the final hearing.*

Viewed in any reasonable light the court is of the opinion that the decision of the Circuit Court is correct, and that there is no error in the record.

DECREE AFFIRMED.

OULTON v. SAVINGS INSTITUTION.

1. Under the 110th section of the internal revenue act of 1864, as amended by the act of July 13th, 1866, taxing deposits in banks, an entry made in the depositor's pass-book of a deposit or payment, is "a certificate of deposit," or "check," or "draft" within the meaning of the section.
2. Under the proviso to that section, savings banks are not exempt from taxation if they have a capital stock, or if they do any other business than receiving deposits to be lent or invested for the sole benefit of the person making such deposits.
3. The fact that, by an agreement between the savings bank and the depositor, money deposited with the bank shall be reimbursed only out of the first disposable funds that shall come into the hands of the bank after demand, being a regulation adopted but for an emergency, and not such as essentially impairs the just claim of a depositor, does not change the case.

ERROR to the Circuit Court for the District of California.

The German Savings and Loan Society, at San Francisco, California, brought a suit in the court below against Oulton, collector of internal revenue, to recover back a tax of $\frac{1}{24}$th

* Bailey v. Hannibal and St. Joseph Railroad Co., Dillon, 176.

of 1 per cent. per month, for moneys deposited in the savings bank during the month of August, 1870.

The case was thus:

The 79th section of the act of June 30th, 1864,* as amended by an act of July 13th, 1866,† enacts:

"That every incorporated or other bank, and every company having a place of business where credits are opened by the *deposit* . . . of money or currency subject to be paid . . . upon *draft*, *check*, or *order*, or where money is advanced or *loaned on stocks*, *bonds*, *bullion*, bills of exchange or promissory notes . . . shall be regarded as a bank."

The 110th section of the same act as amended in the same way, enacts:‡

"That there shall be levied, collected, and paid a tax of $\frac{1}{24}$th of 1 per cent. each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or *otherwise*, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking."

But this section contains a proviso, thus:

"*Provided* that the deposits in associations or companies, known as provident institutions, savings banks, savings funds, or savings institutions, *having no capital stock*, and doing no other business than receiving deposits to be loaned or invested *for the sole benefit of the parties making such deposits, without profit or compensation to the association or company*, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than $500 made in the name of any one person."

With these enactments in force, Oulton, collector of internal revenue at San Francisco, laid the aforesaid tax of $\frac{1}{24}$th of 1 per cent. on the loan and savings institution named.

The society was organized under a statute of California, "to provide for the formation of corporations for accumula-

* 13 Stat. at Large, 251. † 14 Id. 115. ‡ Ib. 136.

tions and investment of funds and savings," &c. It had a capital stock of $100,000, of which $60,000 had been paid in cash, the notes of the stockholders being given for the balance.

The capital stock was a part of the security which the depositors had. After paying expenses, 5 per cent. of the net profit of the bank was set aside for a reserve fund, and then 10 per cent. of the remainder set apart for the stockholders, who did not otherwise share in the dividends. And the reserve fund and the interest thereon was lent out and disposed of in the same manner as the deposits, and was kept in the same manner as the capital stock, as security for the depositors.

The bank received deposits, lent the money so deposited, and repaid it, together with the dividends arising from the interest on loans, to depositors, in accordance with the terms, conditions, and plans stated in a prospectus issued by the bank to depositors in a pamphlet, and an agreement thereto appended, which every depositor, upon making a deposit, signed.

Among these terms and conditions were these:

"All moneys now or hereafter deposited by me, shall be reimbursable only out of the first disposable funds that shall come into the hands of the corporation, after the date of any demand for the reimbursement thereof, and after payment of all sums for the reimbursement of which demand shall have been made prior to the date of my demand.

"The corporation will only engage to repay depositors when there is money on hand which the board of directors may not deem it necessary to reserve for other payments.

"When there is not money enough on hand to repay all the deposits applied for, the directors shall make no new loans nor investments until there is again sufficient money on hand to meet the current applications; and if the demand shall, in their judgment, become excessive or general, they shall have power to set aside all applications previously made which may not have been satisfied, and to order an apportionment of all the funds, as they may be got in, and at such short intervals as they may

judge proper, among all the ordinary depositors, in proportion to the amount of their deposits."

No money was received on deposit or held otherwise than upon the terms and conditions thus set forth in the prospectus and agreement.

No accounts had ever been opened or moneys received subject to payment on draft, check, or order. When a deposit was made a pass-book was given to the depositor, and *an entry of the deposit made in it* and in the books of the bank. When the money was drawn the depositor presented his pass-book, received his money and signed a receipt for it in the books of the bank, and an entry was made in the pass-book. When the depositor could not appear in person to receive his money, he sent an order with the pass-book, and on the production of the pass-book and order the order was taken as a receipt and pasted in the receipt book in the place of the receipt, and the entry made in the pass-book. No such order was ever paid without a presentation of the pass-book with the order. In practice, although not obliged to do so, the company always intended to keep sufficient money on hand to meet all ordinary calls when made, and it always paid upon call, so long as there was money to do so. There had been one or two occasions when there was a heavy demand for money, and when it had not been able to meet on call all ordinary demands. Loans were usually made on real estate. This was the company's regular mode and business; but when unable to put all the deposits out on real estate, it lent them on other securities, such as mint certificates, bonds of the United States, State bonds, Oakland, San Francisco, and other bonds, San Francisco Gas Company and Spring Valley Water Works Company's stocks. But this was not the regular business of the company, and such loans were but temporary. The company did not lend on bills of exchange, or promissory notes without mortgages, and did not pay out money on drafts or checks. It issued certificates for "term deposits" not transferable, but the certificates were issued subject to the foregoing agreement. The certificate when made out was cut from a correspond-

ing stump, and before delivery the party receiving it signed the receipt upon the stump, showing that it was received subject to the conditions of the said agreement upon which deposits were received.

As conclusions of law, the court found:

1st. That the company received no deposits of money subject to payment by check or draft, or represented by certificates of deposits, or otherwise, payable on demand, or at some future day, within the meaning of the revenue acts of the United States.

2d. That the moneys deposited with it were not subject to the tax assessed thereon and collected by the defendant.

3d. That the plaintiff was entitled to recover.

Judgment being entered accordingly in favor of the company, the collector brought the case here.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error:

1. As this bank had a capital stock of $100,000, it does not fall within the proviso of the act of July 13th, 1866, exempting certain savings banks from taxation. In the *Bank for Savings* v. *The Collector** (a case which, though on a former statute, covers the principle of the present one), this court held that, independently of some proviso exempting it, a savings bank, though without any capital and without shareholders or corporators, interested in it or entitled to participate in its profits, was liable to taxation as "a bank." *A fortiori*, a savings bank with a capital stock falls within the rule; and the proviso by expressly excluding from the operation of the body of the section, savings banks with no capital stock, shows that savings banks having a capital stock fall within it.

2. As the bank set aside nearly 10 per cent. of the net profits for the stockholders, who furnished the capital, it did other business than receiving deposits "to be loaned or invested for the sole benefit of the parties making such de-

* 8 Wallace, 495.

posits without profit or compensation to the association or company." It was in fact carried on as much for the profit and benefit of the stockholders as of the depositors. Indeed if the company had large deposits and did much business, it would have been carried on much more so.

3. The deposits made in this bank were deposits "subject to payment by check or draft, or represented by certificate of deposit or otherwise," within the meaning of the statute. The entry in the pass-book was a "certificate of deposit." If not, the deposit was represented by *it*, otherwise than by such certificate.

Messrs. J. R. Jardoe and C. E. Whitehead, contra:

1. The intention of Congress was to impose a tax upon capital engaged in what is commonly known as "banking."

No interest is paid by ordinary banks on moneys deposited with them. All the profits belong to the bank. Interest, however, *is* paid in savings banks to their depositors. Ordinary banks make vast profits from their deposits; because, unlike savings societies, they pay nothing for the use of them. Therefore, the act to tax bank capital provides a tax upon all such deposits as were represented in the hands of the depositors by certain designated certificates, "*or otherwise*," meaning by any other means which could possibly make the depositor a holder or user, or give him credit upon the moneys which were deposited with the bank. Ordinary banks derive great profits from them, and to such banks, the only ones that do make great profits, the provision should be confined.

2. This company was not a bank, nor engaged in the business of banking within the meaning of the act. To render a company liable as a bank it must be a corporation engaged in the business of banking, and holding *deposits* subject to *payment* by check, draft, or otherwise.

This society received deposits which it lent out for the benefit of the depositors, giving the depositors all the net profits. These deposits were in nowise payable to the depositors by the bank, except when the loan should be paid

in by the person to whom it might be lent. The bank had neither circulation, checks, drafts, certificates of deposit, or exchange. It was simply a trustee to invest. Such institutions have been decided not to be banks in legal language.*

The provisions of contracts between these saving institutions and their depositors have been held to be strictly enforceable even to their smallest detail.†

It is clear, therefore, from the provisions of these contracts that no depositor could ever maintain an action for debt or in assumpsit upon these contracts; nor has he any money with either of these banks which is *ex necessitate* payable at any time either on check, draft or order, or is represented by certificate of deposit, *or otherwise.*

These banks, therefore, occupy an anomalous position, and one clearly not contemplated by the revenue act. In them the depositors receive the profits and bear the risks of the business, and in so doing occupy a position different from that held by any other class of persons known to the law. If A. deposit with a bank of California, his claim is good whether the bank wins or loses by its management of his funds; but if he deposits with a company like this one, he has no claim for recovery if the company shall lose its money by untoward circumstances, national bankruptcy, or any cause that may produce a fall in commercial values. Thus the *Bank of Savings* v. *Collector*, cited by opposing counsel, is not in point. The plaintiff in that case,‡ *could be called on* to make *payments* on four stated days in the year, and therefore four times in each year an action at law would lie against it; it therefore held money payable at some *future time*, and its funds were repayable on *draft.* The case was put by the court on the very point of *obligation of repayment.*§ Our banks, as we have seen, hold no funds payable by draft, or otherwise, and none of which it can absolutely be predicated that they will ever be repaid.

* State of Louisiana *v.* The Louisiana Savings Co., 12 Louisiana Annual, 572.

† Wall *v.* Provident Institution for Savings, 3 Allen, 96; S. C., 6 Allen, 321; Warhus *v.* Bowery Savings Bank, 5 Duer, 67; S. C., 21 New York, 546.

‡ See page 497. § See page 512.

Again; it would seem plain that the general enactment in section 110 does not impose a tax upon this society. Reliance has to be had on the proviso in the same section. But when you resort to the proviso you can impose the tax only by implication. Now you cannot lawfully so impose a tax. A proviso does not enlarge the powers of a statute,* and any man who will bring an action for a penalty under an act of Parliament must show that he is entitled thereto under the enactory clauses.† If a statute imposed a tax on all dwelling-houses and stores, and if a proviso exempted all manufactories where steam was used, this would not make manufactories where steam was not used liable, nor indeed make anything liable except what the statute declared should be liable.

Mr. Justice CLIFFORD delivered the opinion of the court.

Associations engaged in moneyed transactions, whether incorporated or not, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stock, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, are regarded as banks, subject to taxation, under the internal revenue laws which were in operation when the taxes in controversy in the present suit were assessed and collected; but the same section which created the liability and authorized the assessment of the taxes, also provided that savings banks, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less

* Dwarris on Statutes, 515; Sedgwick on Statutory Law, 62.

† Spieres v. Parker, 1 Term, 145; 1 Kent, 463.

Restatement of the case in the opinion.

than five hundred dollars made in the name of any one person.*

Such taxes as are authorized by that act, to the amount of $2697.84, were assessed against the plaintiffs by the assessor of the district, and the record shows that they paid the same under protest to the collector of the same district, and that they instituted the present suit in the State court to recover back the amount, which was duly removed, on motion of the defendant, into the Circuit Court. Due appeal, it appears, was taken by the plaintiff from the decision of the assessor levying the tax to the commissioner, and the commissioner affirmed the action of the assessor and decided that the tax was legally assessed.† Service was made, and the defendant appeared and filed an answer, which amounted to the general issue, and prayed to be dismissed with judgment against the plaintiffs for his costs, which is a motion in the nature of a demurrer. Hearing was had before Mr. Justice Field, and he denied the application, holding that the plaintiffs, if they proved *all* of the allegations of their complaint, would be entitled to recover. Leave was subsequently granted to the defendant by the circuit judge to amend his answer, and he accordingly filed the amended answer which is exhibited in the record. Evidence was taken, and the parties, having waived a jury, submitted the case, law and fact, to the determination of the court, and the court rendered judgment in favor of the plaintiffs for the whole amount claimed in the declaration, and the defendant sued out the present writ of error.

Three errors are assigned by the present plaintiff, in substance and effect as follows: (1.) That the bank is not within the proviso exempting certain savings banks from such taxation, as the bank had a capital stock of $100,000, as stated in the finding of the Circuit Court. (2.) Because the bank did other business than receiving the deposits to be loaned or invested for the sole benefit of the depositors, without compensation to the association or company. (3.) Because

* 14 Stat. at Large, 115; Ib. 187. † Ib. 152.

the deposits made in the bank are deposits subject to payment by check or draft, or represented in a way to bring the bank within the operation of the body of the section imposing the tax.*

Unrestrained by the proviso, it is quite clear that the bank would fall within the body of the section and be subject to the tax which the section levies, as the managers of the institution have a place of business where credits are opened *by deposit*, or collection of money or currency, subject to be paid or remitted by check or draft, or represented by certificates of deposit. Attempt is made to controvert the proposition that the money deposited is represented by certificates of deposit, or that it is subject to check or draft, but it is quite clear that the pass-book furnished to the depositor performs the same office as the certificate, check, or draft, as between the person making the deposit and the bank, showing to the entire satisfaction of the court that the evidence brings the bank within the material words of the section, and that the framers of the act intended to recognize the well-known fact that there are banks of deposit without authority to make discounts, or to issue a circulating medium.

Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than

* 14 Stat. at Large, 136.

one of those functions is a bank in the strictest commercial sense, and unless such a bank is brought within the proviso under consideration, is equally subject to taxation as if authorized to make discounts and issue circulation as well as to receive deposits.*

Tested by these considerations it is clear that the judgment must be reversed unless it appears that the bank is within the proviso to the section which imposes the tax, and such was the decision of this court in a case involving the same question, though it arose under the prior act of Congress levying internal revenue duties.

Two propositions were decided in that case, which are directly applicable to the case before the court, and the court is of the opinion that the same principles should be applied in the present case. They are as follows:

1. That savings banks which receive deposits and lend the same for the benefit of their depositors, if the bank is under obligations to repay the amount when demanded, agreeably to their by-laws and charter, whether upon check, draft, or certificate of deposit, are engaged in the business of banking within the meaning of the body of the section imposing the tax, though the bank has no capital stock and does no other business of banking.

2. That savings banks, described in the proviso and thereby exempted from taxation, became subject to the duty imposed by the body of the section on the repeal of the proviso, though they had no capital stock, and neither made discounts nor issued currency as circulation, nor transacted any business of banking except to receive deposits, loan the same for the benefit of the depositors, and repay the amount as aforesaid in pursuance of their by-laws and charter.†

Apply those rules to the present case, and it is evident

* Bank for Savings v. Collector, 3 Wallace, 510; Angell & Ames on Corporations (9th ed.), § 55; Insurance Co. v. Ely, 2 Cowan, 678; McCulloch's Commercial Dictionary, 73–146; Duncan v. Savings Institution, 10 Gill & Johnson, 309; People v. Utica Insurance Co., 15 Johnson, 390; Grant on Banking, 1–6, 381–614.

† Bank for Savings v. Collector, 3 Wallace, 512.

that the only inquiry open is whether the plaintiff bank is exempted by the proviso from the taxation which the body of the section imposes.

Savings banks are not exempt from such taxation, except in certain cases, nor are any entirely exempted unless they have invested the whole of their deposits in the securities of the United States, if any of the deposits made in the name of one person amounted to, or exceeded, $500. Deposits in sums less than $500, and all such as are invested in the public securities, if the bank falls within the category described in the proviso, are exempt from such taxation, but every savings bank which does not fall within the category described in the proviso, is subject to taxation the same as any other bank coming within the purview of the act imposing the tax.

Such banks are not exempt from such taxation if they have a capital stock, nor if they do any other business than receiving deposits to be loaned or invested for the sole benefit of the person making such deposits. Both of those conditions are expressed in plain and unambiguous terms, and the law-makers, as if to place the second beyond cavil, provided not only that the deposits should be loaned or invested for *the sole benefit* of the depositors, but added, "and without profit or compensation to the association," showing beyond controversy that Congress did not intend to exempt any savings banks from such taxation, except such as were devoted to charitable purposes and were managed solely for the benefit of the indigent, or of persons of small means.

Savings institutions undoubtedly exist which were established *solely* for charitable purposes, and many of them are conducted in the spirit in which they were established, as a means of benefiting the indigent, and it is plain that Congress intended to exempt all such from the taxation imposed by the body of the section, but it is equally well known that there is another large class of such institutions which are doing an extensive and profitable business, and being the depositories of vast sums of money are earning large profits,

which are as justly subject to taxation as the profits of any other banking corporation in the country.

Power to lay and collect taxes is vested in Congress, and Congress has enacted to the effect that all banks, except such as fall within the category described in the proviso under consideration, shall be subject to the tax imposed by the body of the section, and it is clear that the plaintiff bank does not come within either of the two conditions specified in the proviso, both of which must concur in order that the bank may claim to be exempt from the tax.

Argument to show that the bank does not come within the first condition is certainly unnecessary, as it is admitted that the bank has a capital stock of $100,000, of which $60,000 has been paid in cash, and that the bank holds the notes of the shareholders for the residue, the capital stock being a part of the security held for the benefit of the depositors. Five per cent. of the net profits of the bank is set aside as a reserved fund, and ten per cent. of the remainder is set apart for the stockholders who do not otherwise share in the dividends. It also appears that the reserved fund and the interest thereon is loaned and invested in the same manner as the deposits, and like the capital stock is kept as a security for the depositors; that the bank receives deposits, lends the money deposited and repays it, together with the dividends arising from interest, in accordance with the terms and conditions stated in a prospectus issued by the bank to the depositors and an agreement thereto appended, which are exhibited in the record. Every depositor upon making a deposit signs the agreement, and no money is received on deposit or held otherwise than upon the terms and conditions set forth in the prospectus and agreement. Accounts have never been opened nor moneys received subject to payment on draft, check, or order, nor has the bank ever issued certificates of deposit, except such as were temporary, to give time to a depositor to determine whether he will make a term deposit or one subject to be drawn when wanted. When a deposit is made a pass-book is given to the depositor and an entry of the deposit is made in it *and in the books of the*

bank, and the money is drawn out by the depositor *on presenting the pass-book* or by a person *holding his order*. Money sufficient to meet all ordinary demands is always intended to be kept on hand, and the bank always pays money upon calls, and it appears that there has never been a time since the bank was organized that it was not able to meet all ordinary demands. Generally the bank asks the depositor to give a day or more notice on large amounts, but the managers have never found it necessary to make any rule upon the subject. Loans are usually made on security of real estate, but in some cases upon bullion or personal property, nor are any loans made upon bills of exchange, promissory notes, or other evidences of private indebtedness. Prompt payments have always been made, but the agreement contains the stipulation that money deposited with the bank shall be reimbursed only out of the first disposable funds that shall come into the hands of the bank after demand; and the defendants refer to that provision as distinguishing the case from the prior decision of this court, but the court is of the opinion that the proposition cannot be sustained, as the regulation is evidently one adopted merely for an emergency, and that it was never intended to control the general dealings of the bank with its depositors. Money deposited in such a bank by one of its customers becomes a debt for which the bank is liable, and it cannot be admitted that the managers could lawfully adopt any rule which should postpone its payment indefinitely.* They may, doubtless, make any reasonable rule under that stipulation to enable them to raise means for such an extraordinary occasion, but they could not refuse payment altogether or provide for such delay as would essentially impair the value of the just claim of a depositor. Throughout, the amount of the deposit would continue to be a debt due to the depositor, demandable of the bank on presenting the pass-book, under such reasonable regulations as the bank or its managers may adopt.

* Thompson v. Riggs, 5 Wallace, 678; Marine Bank v. Fulton Bank, 2 Id. 252.

Syllabus.

Prior regulations had been made in the reported case containing our former decision which gave the depositor the right to make such demand at four stated periods in the year, but in the case before the court no regulation upon the subject has been adopted other than what appears in the written agreement, which has never been enforced. Whether it ever will be or not is a matter which cannot be known, nor is such an inquiry of any importance in the present case, as the court is of the opinion that the stipulation, inasmuch as it has never become operative, cannot avail the plaintiffs in this controversy.

Beyond all question the bank has capital stock, and inasmuch as 10 per cent. of it is set apart for the stockholders, it is not correct to say that the business which the bank does in receiving deposits and loaning and investing the same is done without compensation to the association.

Viewed in the light of these suggestions it is clear that the bank does not fall within the category described in the proviso, and that the tax was legally assessed and collected.

JUDGMENT REVERSED, and the cause remanded with directions to issue a NEW VENIRE.

GODDARD v. FOSTER.

1. A., at Valparaiso, was the agent, under an agreement of May 7th, 1849, of B., at Boston, who was sending him adventures and shipments of goods, he selling the goods and investing the proceeds in other merchandise consigned to B., who sold the return cargoes; keeping an account of the profit and loss. A. was to have one-quarter of the net profits of B.'s business, that he, A., "conducted to completion," but was at liberty to withdraw from the arrangement at any time, "by giving B. so much notice that any voyage he, B., may have commenced previous to receipt of such advice, shall receive the full benefit of all A.'s service to its final accomplishment."

On the 22d of February, 1850, A. wrote to B. that he had resolved to join a Valparaiso house, which he named, but added: "I will manage your business as usual until 31st December, which will afford you ample time

Statement of the case.

to make your arrangements for sending some one out, if you are inclined." B. received this letter May 29th, 1850, and *afterwards* loaded and dispatched a ship consigned to A., or "in his absence," to the house which he had mentioned as the one he had resolved to join. A. concluded the whole business of this voyage as he had done that of previous voyages; but it was not "conducted to completion" prior to December 31st, 1850.

Held, that A.'s letter of 22d February was to be taken as if he had said: "In the interval, before the arrival of any new agent to represent you, I will perform the same services for the new voyages *not covered by the contract of May 7th*, 1849, that I have rendered in the voyages covered by the contract, and that your new agent would perform were he here;" and, accordingly, that for all services performed by him in regard to *this* voyage he was entitled to be paid what the services were reasonably worth.

2. The rule of law that the interpretation of written instruments is a question of law for the court, is applied with full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful, does not relieve the court of this duty, or make the question one of fact for the jury. It is only where terms used are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of the jury is invoked to ascertain their meaning.

3. Where interest is allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*.

ERROR to the Circuit Court for the District of New York; the case being thus:

In June, 1843, G. J. Foster and W. W. Goddard entered into an agreement, in writing, under seal, by which Foster agreed to go to the west coast of South America, and there reside as Goddard's agent for five years, selling the outward cargoes, purchasing return cargoes, collecting and forwarding information, and attending to the business and dispatch of the defendant's ships, giving his whole time to the business, in consideration of one-tenth of the net profits at the end of the term, or $1000 per annum if the one-tenth of the profits amounted to less than that sum.

Under this agreement Foster went to the west coast of South America, and there resided during the five years, performing his part of the agreement, and at its expiration, in 1848, returned to Boston, where the parties made a new agreement in writing and under seal, dated May 7th, 1849,

by which Foster agreed to return to the west coast, upon a similar employment, *giving his whole time to Goddard's business* in consideration of "one-quarter of the net profits of Goddard's business in that trade, that he (Foster) shall have *conducted to completion*," to be paid to him on his return. This agreement provided that Foster was to leave in Goddard's hands his share of the profits under the former agreement; that Foster might withdraw from this arrangement, "which he is at liberty to do at any time, by giving said Goddard so much notice that *any voyage he may have commenced previous to receipt of such advice, shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise.*" It also provided that Goddard might "annul the agreement whenever he may choose to do so," and that Foster should be liable "to the full extent of his interest and means for all losses in the business, and for all risks and casualties attendant thereon."

Foster, under this agreement, returned to the coast and continued to transact the business required of him, and on the 22d of February, 1850, wrote to Goddard that he had determined to join the house of Alsop & Co. on the 1st of January, 1851. In this letter he said:

"*I will manage your business as usual until the 31st of December*, which will afford you ample time to make your arrangements for sending some one out, if you be inclined."

On the 13th of April, 1850, Goddard replied:

"I am very glad to learn your decision to join the house, it being what I would have advised for your own interest."

Goddard's reply was received by Foster May 29th, 1850.

After sending this letter, Goddard loaded and dispatched from Boston the ship Harriet Erving, upon a voyage styled hereinafter "her third voyage." She left Boston on the 21st of August, arrived at Valparaiso on the 8th of December, and sailed thence December 27th, for points on the coast, to complete her cargo, and thence to Boston.

From the inception of this voyage, Goddard advised Fos-

ter by letter of his intentions in relation to her outward and return cargoes, and instructed him fully as to what he, Foster, should do on the coast in relation to the same.

The cargo was consigned to Foster, "or, in his absence, to Alsop & Co."

When the ship sailed from Boston, Goddard instructed the captain by letter as follows:

"I wish you to proceed in her with all possible dispatch direct to Valparaiso, where my *agent*, Mr. G. J. Foster, or, in his absence, Messrs. Alsop & Co., will dispose of your outward cargo, provide for the wants, and direct your further movements."

Foster concluded the whole business of this voyage in the same manner in which he had done that of previous voyages, prepared and forwarded to Goddard a note or memorandum of cargo suitable to be sent to the coast, purchased and had in readiness for the ship her return cargo, and dispatched her from the coast, directed the sale of her outward cargo, and was in constant communication with Goddard in relation thereto.

He joined the house of Alsop & Co. on the 1st of January, 1851. At that time there had been sold of the outward cargo $96,000, and there was afterwards sold $150,000. The entire service had been performed, so far as the homeward cargo was concerned, and nine-tenths of his whole services in relation to the voyage had been performed.

After joining the house of Alsop & Co. he completed the business of the voyage by directing, as before, the sale of the remainder of the cargo. This was done with the knowledge of and, as it appeared, without objection on the part of the other partners in the house of Alsop & Co.

After joining the house, he sent a part of the cargo to other points on the coast for a better market, in the exercise of his discretion as Goddard's agent, as he had done with previous cargoes, which Alsop & Co. never did for any of their correspondents, unless expressly authorized. The sales between January 1st and June 30th, at Valparaiso and Lima,

amounted to $135,000, and the remainder, about $15,000, was sold during the years 1851, 1852, and 1853.

The sales of the outward cargoes and the purchases of the homeward cargoes were made by Alsop & Co., who advanced the necessary funds, and charged and received a commission therefor.

Foster advised Goddard, by private letter of February 25th, 1851, of the sales he was making of the outward cargo, and that he should work off part of the goods "through Callao," the port of Lima.

Alsop & Co. rendered accounts of the sales at Valparaiso and Lima to Goddard.

In November, 1851, one Erving arrived on the coast, to act as Goddard's agent in the same business, in subsequent voyages. He took no part in the unfinished business of this voyage.

Foster returned to the United States in 1856, when Goddard expressed himself perfectly satisfied with everything he had done in his business.

On the 1st of May, 1857, Foster filed a bill in equity against Goddard in the Circuit Court for the District of Massachusetts, for an account, and to recover his share of the profits under the two agreements of 1843 and 1849. Goddard having appeared and answered, a decree for an account was entered, and an account was taken before a master. Upon that accounting Foster claimed, under the agreement of May 7th, 1849, a quarter of the profits of the voyage of the Harriet Erving, on the ground that by a subsequent agreement of the parties, shown by their correspondence, it was to be considered as included in that agreement, and that it was substantially brought to a completion before January 1st, 1851. The master so decided, and reported as due to Foster for his share in the profits of this voyage, $21,943. Upon exceptions to the master's report, the circuit judge disallowed this item,* holding that this voyage of the Harriet Erving was not covered by the agreement between the parties of

* 1 Clifford, 158.

Statement of the case.

May 7th, 1849, and upon appeal this court affirmed (and upon the same ground) the final decree, whereby this item was disallowed in that suit.* Goddard satisfied the final decree in that suit.

In this state of things Foster sued Goddard in *assumpsit* for services rendered by him in this voyage of the Harriet Erving.

The first count was on a special agreement to pay one-fourth of the profits of the outward and homeward voyages, being $23,600.44, with interest from March 1st, 1858.† The second, on a promise to pay a reasonable compensation. The third, on a promise to pay a reasonable compensation for services to January 1st, 1851. The fourth and fifth counts were the common counts of *indebitatus assumpsit* and *quantum meruit*. The damages were laid at $50,000.

The plea was the general issue with notice of defences:

1. A former recovery by the same plaintiff against the same defendant in the suit in equity in the Circuit Court for the District of Massachusetts, brought for an account under the agreement between the parties of May 7th, 1849, and that the defendant's services, if any, now sued for, were rendered under that agreement.

2. The statute of limitations.

Pursuant to the notice the defendant offered in evidence the record in the equity suit as a bar to the pending action, but the court rejected the evidence.

He also offered the same record in evidence as a bar to all claim in the action for services rendered for him before the close of the year in which the plaintiff had given notice of his withdrawal from the second written agreement. But the court rejected the evidence as inadmissible even for that purpose.

Evidence was offered by the plaintiff of the value of his services, to which the defendant objected, insisting that the services of the plaintiff in respect to that voyage, if any, were rendered under the written agreement, but the court

* 1 Black, 506. † This count was ruled out and abandoned at the trial.

ruled that the services shown were outside of that agreement, and admitted the evidence.

To all these rulings the defendant excepted.

The court having charged that neither party was to suffer in any way from the lapse of time, and thus disposing of the plea of the statute of limitations, charged further among other things—

1st. That the plaintiff could not recover under the first count of the declaration, nor any part of the profits of the voyage.

2d. That the plaintiff was entitled to recover such sum as upon the evidence the jury might regard to be the reasonable *quantum meruit* value of his services.

The court added:

"That includes a consideration by you of what his services were, the entire scope of the trade, and Mr. Foster's qualifications for those services at the time he rendered the services in reference to this voyage, and the consideration of how much these services were in bulk or in value before the 1st of January, 1851, and the consideration of the extent of these services after that date, and whether they are to be diminished after by any payment or allowance which ought to be charged against Mr. Foster because of any compensation he may have received as a member of the firm of Alsop & Co. The whole question is one of fact for you to pass upon as men of judgment and intelligence, and upon the evidence, applying your best faculties to it.

"If you arrive at any sum which you regard as proper for the value of these services, then Mr. Foster is entitled to interest on that sum at the rate provided by law of New York, 7 per cent. per annum, from the time of the commencement of this suit."

3d. That there was an agreement between the parties for the rendering of some service distinct and independent from that of May 7th, 1849; that that agreement as matter of law, as one drawn from correspondence between the parties, the jury were bound to find, and that there was an agreement between the parties for the performance, by Mr. Foster, of such services as he rendered in respect of the third

voyage of the Harriet Erving, to be compensated for at such rates as these services reasonably deserved.

To the second and third of the charges, as above given, the defendant excepted; no exception being taken by either party to the first. The jury found for the plaintiff $29,407, and the defendant brought the case here for review.

The reader has doubtless seen that, throwing out the question how far the meaning of the old contract had been settled by the decision in the equity suit in the Circuit Court for Massachusetts, and the question of interest, there were really but two questions in the case.

I. What did the agreement as made by the correspondence (Foster's letter of February 22d, 1850, and Goddard's reply, being chief features in it) mean?

Did it mean, as Goddard, the defendant, insisted, that Foster would perform all the duties required by the old contract on the terms and for the compensation specified in *it*, that is to say, would perform them *under that contract;* a construction which, as this old contract gave nothing but for "business conducted to completion," would give nothing for any service performed before December 31st, 1850, as the voyage in question was not so conducted, to a conclusion, before that date; while for any service performed after that date the argument was susceptible of being made that all that the plaintiff did he did as a member of the firm of Alsop & Co., and was paid by the commission given to that house.

OR, as Foster contended it was, was the meaning of the agreement as if he, Foster, had written—

"In the interval, before the arrival of any new agent to represent you, I will perform the same services for the new voyages, not covered by the contract of May 7th, 1849, that I have rendered in the voyages covered by the contract and that your new agent would perform were he here?"—

a construction which would naturally imply that the new services were to be paid for at such reasonable rates as they were fairly worth.

II. Was the question "whether there was an agreement

between the parties, shown by the correspondence, for the rendering of the services in question, distinct and independent of the agreement of May 7th, 1850, a question of law to be determined by the court, or a question for the jury?"

Mr. D. D. Lord, for the plaintiff in error:

I. As to the services rendered prior to the 31st of December, 1850.

1. The letter of 22d February fixed the termination of the old contract for the 31st December, not only without notice that any services rendered in the interval were to be excluded from its terms, but with the express assurance that the business (including, of course, all of it) would, during this term, be managed "as usual."

Even though the plaintiff could not share in the profits of this voyage of the Erving, he was, nevertheless, bound by his contract to attend to all her business. The terms of his contract expressly obliged him to attend to all business, and excluded him from the profits of such as he did not complete. To imply an agreement to pay for such services rendered under the contract, because the contract itself provided no such compensation for them, is virtually to set that contract aside. The contract was, when made, very advantageous for the plaintiff. He could easily protect himself against any casual disadvantage caused by the late arrivals of new adventures, by the fixing, as he had a right to do, the time and terms of his withdrawal. But the chance of any loss from this provision was compensated by the large share allowed on completed business; it was more than double his compensation under the agreement of 1843.

All Foster's services were rendered to the Erving without authority, instruction, or notice from the defendant, except such as was to be inferred from the contract itself; and he must have understood that these services were rendered in performance of the agreement of 7th May, 1849; because, in his former action on this contract, the bill in equity, he made them the ground of a claim for a share in the profits of the adventure.

Restatement of the case in the opinion.

If the notice of 22d February is susceptible of a construction limiting the plaintiff's duties to adventures previously commenced, it is at least equally capable of a construction binding him to manage all the defendant's business on the terms of the contract; and as the plaintiff might have avoided the ambiguity, this latter construction should be adopted.

2. The sale of so much of the Erving's outward cargo as was made after 31st December, was not a service for which the plaintiff can claim any compensation, beyond what was due to the firm of which he had become a member. Alsop & Co. had accepted a consignment of the cargo, and this acceptance entitled the defendant to the full services of every partner in the house. If the plaintiff, after becoming a partner, had the exclusive charge of these sales, it was only as attending to that branch of business of the house; he is not shown to have rendered any services in disposing of that part of the cargo which was sold at Valparaiso, which he did not perform in reference to other consignments from other parties. But, however special or valuable his services may have been, they did not exceed his duties under his newly assumed office of consignee, and were compensated by the large commission paid to Alsop & Co., in which he participated. To assume that he was acting in a merely personal capacity, as agent of Goddard, would be to suppose that he was acting contrary to his letter of 22d February, and contrary to his obligations to his new house.

II. The court took from the jury the decision of the point whether a contract different from the old one existed. The matter depended on a correspondence, and on various facts of whose effect the jury was the judge.

Mr. W. M. Evarts, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Compensation for services rendered by the plaintiff, as agent for the defendant in conducting a certain commercial adventure at his request and for his benefit, is claimed by

Restatement of the case in the opinion.

the plaintiff in the present suit, which is an action of assumpsit for the value of the services rendered.

Prior services of like kind, in transactions of a similar character, had been rendered by the plaintiff for the same defendant, to which, though not embraced in this suit, and to the litigation which grew out of the same, it becomes necessary to advert in order to a clear understanding of the present controversy.

Those prior transactions had their origin in two written agreements between the parties. By the first agreement, dated June 24th, 1843, the plaintiff engaged, among other things, to proceed at once to Valparaiso, and there to remain for the term of five years, and to devote himself, for the whole time, exclusively to the business of the other party, such as the sale and purchase of cargoes, collecting freight-moneys, procuring return freights, eliciting orders for the purchase and shipment of goods, effecting the sale of vessels, and collecting and forwarding all such information as he could obtain respecting the trade. In consideration of which the defendant engaged that he, the plaintiff, shall, at the expiration of five years, be entitled to one-tenth of the net profits of his business in that trade, subject to certain deductions for interest, cost, and expenses, as therein specified. Under that agreement the plaintiff proceeded to Valparaiso, where he continued to reside during the period prescribed, and well and truly performed all things required in the agreement. Having performed the agreement, the plaintiff returned to Boston, where the defendant resided, and on the 7th of May, 1849, they entered into the second agreement, in which the plaintiff engaged to proceed at once to the west coast of South America, and to devote his whole time in those parts, as also in Mexico and California, exclusively to the management of the business of the defendant in those countries, such as the sale and purchase of merchandise, or any other property, collecting freight-moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and for-

warding all such information as he could obtain respecting the trade. In consideration of which the defendant engaged that he, the plaintiff, "shall, on his return, be entitled to one-fourth of the net profits of his business in that trade, that he (the plaintiff) shall have conducted to completion," subject to certain deductions for interest, and all costs and expenses incurred, both at home and abroad, in prosecuting the business, including port charges and the expense of sailing and keeping in repair the vessels employed, the defendant having the right to purchase, charter, freight, and sell the vessels designed for the trade at his option, charging or crediting in the general account the profit or loss in every such transaction. What funds the plaintiff had, less two thousand dollars, he engaged to leave in the hands of the defendant, which he agreed not to abstract, nor any portion of the profits, "until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time by giving the defendant so much notice that any voyage he may have commenced, previous to the receipt of such advice, shall receive the full benefit of all of the plaintiff's service to its final accomplishment, and not otherwise." Pursuant to the agreement the plaintiff proceeded without delay to the place designated, and conducted the described business until the twenty-second of February of the next year, when he gave the required notice to take effect at the close of the year; and that on the first of January of the succeeding year he should join the house of Alsop & Co.; and he asked for an account. On the thirteenth of April of the same year, the defendant acknowledged the receipt of the letter written by the plaintiff, giving the required notice, approving the decision the plaintiff had made to join that house, and promised to comply with his request "as speedily as possible."

Briefly described, the general mode of conducting the business under each agreement was by adventures and shipments of goods, procured at Boston by the defendant and consigned to the plaintiff, by whom the merchandise was sold and the proceeds invested in other merchandise which

Restatement of the case in the opinion.

was consigned to the defendant, who sold the return cargoes, and he kept the books and vouchers, showing the exact profit or loss on each adventure.

Large profits were earned in the business, and at the expiration of the period limited for the continuance of the agreement, a large sum was due to the plaintiff in the hands of the defendant, where it had been allowed to remain without his rendering any account. Repeated requests for an account having failed to secure one, the present plaintiff, on the first day of May, 1857, instituted a suit in equity in the Circuit Court for the District of Massachusetts, and the cause having proceeded to final hearing, and the court having entered a decretal order in favor of the plaintiff, sent the cause to a master to ascertain what the plaintiff was entitled to recover. He made a report in which he allowed, among other matters, the claim embraced in the present suit.

Ten exceptions were filed by the present defendant to that report, but it will not be necessary to refer to any one of them, except the tenth, which is substantially as follows: For that the said master has allowed the complainant one-fourth of the profits made by the respondent in the use and employment of a vessel called the Harriet Erving and her cargo during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, nor was the vessel or cargo or the profits resulting therefrom during the said voyage, embraced in the said second agreement, nor in any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent.

Two of the objections taken to the finding of the master in respect to that voyage, as expressed in that exception, were sustained by the Circuit Court: (1.) That the voyage was not within the written agreement, as it was not commenced when the plaintiff gave the notice of his intention to withdraw from the arrangement nor when the defendant, on the thirteenth of April following, acknowledged the receipt of the notice and expressed his approval of the step taken by the plaintiff. (2.) That the proofs were not sufficient to

warrant the conclusion that the parties ever agreed that this voyage should be settled and adjusted within the principles of the written agreement; and if they did so agree, that there was no proper allegation in the bill to support such a decree.

Governed by those views the Circuit Court sustained the exception to the report allowing the claim, and on appeal to this court the decree of the Circuit Court sustaining the same was affirmed.*

Payment of the claim being refused, the plaintiff, on the fourteenth of August, 1862, instituted the present suit in the Court of Common Pleas for the city and county of New York, where he resides, to recover compensation for his services rendered in respect to that voyage, and the defendant, being a citizen of the State of Massachusetts, removed the cause into the Circuit Court for the first-named district. By the record it appears that the declaration contained a count on a special agreement to pay one-fourth of the profits earned by the ship on the voyage not adjusted in the prior suit, but it will not be necessary to remark upon that count, as the court ruled and instructed the jury that the plaintiff could not recover under that count, nor for any part of the profits of the voyage. Apart from that the declaration also contained four other counts, of which the second and third alleged a promise to pay a reasonable compensation for the services rendered, and the fourth and fifth were the common counts of *indebitatus assumpsit*, and *quantum meruit*. Service was made and the defendant appeared and pleaded the general issue, and gave notice that he would give evidence of a former recovery by the plaintiff against the defendant in the said suit in equity in the Circuit Court, founded upon the written agreement, and that the services of the plaintiff, if any, as claimed in the suit, were rendered under the same agreement. He also gave notice that he would give evidence to prove that the alleged causes of action did not accrue within six years next before the commencement of the action.

* Foster v. Goddard, 1 Clifford, 158, 183; Same Case, 1 Black, 506–514.

Testimony was introduced on both sides, and the jury, under the instructions of the court, returned a verdict in favor of the plaintiff for the sum of twenty-nine thousand four hundred and seven dollars and thirty-seven cents, and the defendant excepted and removed the cause into this court. Exceptions were taken by the defendant both to the rulings of the court in admitting and rejecting evidence, and to the refusal of the court to instruct the jury as requested by the defendant, and to the instructions which the court gave to the jury at the request of the plaintiff. Pursuant to the notice given by the defendant he offered in evidence the record in the equity suit as a bar to the pending action, but the court rejected the evidence and the defendant excepted. He also offered the same record in evidence as a bar to all claim in the action for services rendered for the defendant before the close of the year in which he gave the notice of his withdrawal from the second written agreement, but the court rejected the evidence as inadmissible even for that purpose, and the defendant excepted to the ruling. Evidence was offered by the plaintiff of the value of his services, to which the defendant objected, insisting that the services of the plaintiff in respect to that voyage, if any, were rendered under the written agreement, but the court ruled that the services shown were outside of that agreement, and admitted the evidence, to which the defendant excepted.

Evidently these three rulings depend upon the same considerations, and they present one of the most important questions involved in the bill of exceptions. Valuable services were rendered by the plaintiff in relation to that adventure. Conceding that, still it would follow, if, by the true construction of the instrument, he was required to perform the services under that agreement, that the record of the former suit between the parties is a bar to the present action. Both parties admit that proposition, but if the written agreement by its true construction did not require him to render the services in question, then the record of the former suit is no bar, because in that view of the case the

services rendered and for which compensation is sought in the present action were not in issue in the prior litigation, as the causes of action in the two suits are wholly distinct.

Enough has already been remarked to show that the defendant himself was of the opinion in the former suit that the services were not rendered under the written agreement, and that the Circuit Court came to the same conclusion, which was in all things affirmed by this court. Much discussion of the question, therefore, would seem to be unnecessary, as the better opinion is that the question is conclusively settled by the decree in the last-named case. Suppose, however, the question is an open one and is unaffected by those decisions, still the court is of the opinion that the view taken by the defendant in his exception to the master's report in the former suit is correct.

By the terms of the written agreement it is very clear that the plaintiff was not required to render any service in any voyage to be commenced after the receipt by the defendant of the notice of the plaintiff withdrawing from the arrangement, as more fully appears from the mode prescribed of giving the notice, and its effect, as stipulated in the instrument. Such funds as the plaintiff had, less $2000, he was to leave in the hands of the defendant, and the stipulation was that he should not abstract those funds, nor any portion of his profits, until he should see fit to withdraw from the arrangement, which he was at liberty to do at any time by giving the defendant so much notice that any voyage "he may have commenced, previous to the receipt of such advice, shall receive the full benefit of all the plaintiff's services to its final accomplishment." Voyages commenced before the notice of withdrawal was given were within the agreement, whether the vessels had arrived at their port of destination or not, but the plaintiff was not required to render any service under that agreement in relation to voyages projected subsequently, as he was to have no interest in such adventures, not being entitled to any part of the profits nor compelled to share in the loss. One-fourth of the profits of the business "conducted to completion" belonged to the

plaintiff, and in respect to all such voyages he was liable, "to the full extent of his interest and means, for all the losses that may be made in the business, as also for all the risks and casualties attendant thereon."

Taking these two provisions of the agreement together, it is quite clear that the former decisions in the equity suit were correct, as they show that the plaintiff was allowed to withdraw at any time, on giving the required notice, subject to this reasonable and necessary limitation, that as he was to be compensated by a share in the profits of the adventures the required notice should be such that he would remain long enough to complete the business in every voyage from which his compensation was to come. Where profits were made in a voyage, conducted to completion, he was entitled to one-fourth of the profits, but if the voyage resulted in a loss, he was liable to the full extent of his interest and means for his proportion of the same, showing very plainly that his agency under the written agreement was limited to voyages commenced before the notice was given, as no one, it is presumed, will contend that he was required to render services without compensation, and to be liable for a share of the loss in an adventure in which he had no interest.

Opposed to this view is the suggestion that the plaintiff agreed to devote his whole time to the business, but the court is of the opinion that the word business, as used in that connection, must be limited to the period of the full employment of the plaintiff before the notice of withdrawal was given, as his undertaking subsequent to that notice was merely to conduct the business, meaning the business of the voyages previously commenced, to completion, or, as expressed in the phrase describing the character of the notice to be given, that he shall give "so much notice that any voyage he, the defendant, may have commenced previous to the receipt of such advice, shall receive the full benefit of all the plaintiff's services to its final accomplishment."

Viewed in the light of these suggestions, it is plain, we think, that the word business, as used in the first clause of

the agreement, was not intended to have any larger or different meaning from the other parts of the instrument which describe, in detail, the nature of the services he was required to perform. Sufficient has been remarked to show that the exceptions under consideration must be overruled.

Instructions were also given by the court to the jury in respect to the right of the plaintiff to recover upon the other counts, to many of which the defendant also excepted. Those deemed material to be noticed in this connection, are in substance and effect as follows: (1.) That the plaintiff could not recover under the first count of the declaration, nor any part of the profits of the voyage. (2.) That he might recover reasonable compensation under the other counts for such services as he rendered, if he satisfied the jury by the evidence in the case that he was employed by the defendant to perform service in respect to that voyage, by an agreement distinct and independent of the said written agreement, and that the jury, if they find for the plaintiff, should allow interest upon the amount at the rate of seven per cent. from the commencement of the suit. (3.) That the evidence of the agreement, consisting of correspondence between the parties, the question whether it amounts to an agreement or not is a question of law, and that the court instructed the jury that there was an agreement between the parties for the performance by the plaintiff of such services as he rendered in respect to the voyage in question, to be compensated for at such rates as those services reasonably deserved.

Before examining the instructions, some brief reference must be made to the evidence. In the letter giving notice of his intention to withdraw from the arrangement, the plaintiff stated that he would manage the business of the defendant until the close of the same year, and it appears that the defendant subsequently loaded and dispatched the ship, whose third voyage is in question, consigning her to the plaintiff. She left Boston on the twenty-first of August, arrived at Valparaiso on the eighth of December, and sailed thence on the twenty-seventh of the same month for Co-

quimbo and other points on the coast to complete her cargo, and thence returned to Boston, her port of ultimate destination.

From the inception of the voyage, the defendant advised the plaintiff by letter of his intentions in respect to her outward and return cargoes, and instructed him fully as to what he, the plaintiff, should do on the coast in relation to the adventure. He consigned the cargo to the plaintiff, or, in his absence, to Alsop & Co., as appears by the bill of lading, and when the ship sailed he instructed the master to proceed with all possible dispatch direct to Valparaiso, informing him that the plaintiff, as his agent, or, in his absence, the firm named in the bill of lading, would dispose of the outward cargo, provide for the wants of the ship, and direct his further movements.

Suffice it to say the plaintiff concluded the whole business of the voyage in the same manner as he had conducted the business of previous voyages,—that is, he prepared and forwarded to the defendant a memorandum for a cargo suitable to be sent to that market, purchased and had in readiness for the ship her return cargo, and dispatched her from the coast and directed the sale of her outward cargo, and was in constant correspondence with the defendant in relation to the adventure from its inception to its final consummation.

Error is assigned as to the second and third instructions.

1. Argument to show that the second is correct is hardly necessary, as it is quite clear that the plaintiff is entitled to recover a compensation for his services, if he proved that the services were rendered at the request of the defendant under some agreement wholly distinct from the written agreement embraced in the prior litigation. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff, consequently where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation.*

* Curtis v. Fiedler, 2 Black, 478.

2. Next error assigned is that the court erred in charging the jury that the correspondence showed an agreement between the parties distinct from the prior written agreement which was litigated in the equity suit, but the court is of the opinion that the charge was correct, as it is well-settled law that written instruments are always to be construed by the court, except when they contain technical words, or terms of art, or when the instrument is introduced in evidence collaterally, and where its effect depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, in which case the inference to be drawn from it must be left to the jury.* Where the question was whether there was a contract between two parties to be deduced from correspondence, Parke, Baron, said: "The law I take to be this: that it is the duty of the court to construe all written instruments. If there are peculiar expressions used in the instrument, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what is the meaning of those expressions, but it is for the court to decide what is the meaning of the contract." Contracts are frequently made by correspondence between the parties, and in such a state of the evidence it was held, in the case of *Begg* v. *Forbes*,† that the question was exclusively for the court; Jervis, C. J., remarking, "Surely the construction of written documents is for the judge, whether many or few in number." Exceptional cases arise where the contract rests partly in the correspondence and partly in oral communications, in which it is held that the question whether or not there is a contract is a question for the jury.‡ Courts of justice, however, are not denied the same light and information the parties enjoyed when the contract was executed, but they may acquaint themselves with the persons and circumstances that are the subjects of

* Levy v. Gadsby, 3 Cranch, 186; Bliven v N. E. Screw Co., 23 Howard, 432; Etting v The Bank, 11 Wheaton, 75; Barreda v. Silsbee, 2 Black, 168.

† 30 English Law and Equity, 508.

‡ Bolckow v. Seymour, 17 C. B. (N. S), 107; Barreda v. Silsbee, 2 Black, 168.

the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.*

Proof of service at the request of the defendant was full and uncontradicted, and the Circuit Court instructed the jury that the plaintiff was "entitled to recover in the case such sum as the reasonable *quantum meruit* value of his services, upon the evidence, you may regard to be proper;" adding that the instruction "includes a consideration by you of what his services were, the entire scope of the trade, and his qualifications for those services at the time he rendered the same, in reference" to that voyage, and the consideration of how much those services were in bulk or in value before the close of the year, and the consideration of his services after that date, and whether they are to be diminished after by any payment or allowance which ought to be charged against the plaintiff on account of any compensation he may have received as a member of the firm to which he belonged; and stating, in conclusion, to the effect, that the court left the whole case to the jury as a question of fact for their determination.

Most of the other exceptions to the charge of the court are shown to be without merit, by that instruction, which submitted the whole evidence to the jury.

Beyond all question the plaintiff was entitled to interest from the commencement of the suit, and it is not perceived that there is any error in the rule prescribed as to the rate, as it is the rule of the *lex fori*, especially as no rate is fixed in the contract and no place designated for its performance.

Separate examination of the numerous other exceptions as to the ruling of the court, in admitting and rejecting evidence, will not be attempted, as none of them are of any

* Shore v. Wilson, 9 Clarke & Finelly, 569; Addison on Contracts, 846; Blossom v. Griffin, 13 New York, 569; O'Neill v. James, 43 Id. 84-92.

general importance. Suffice it to say they have all been examined and the court is of the opinion that they must severally be overruled, and that there is no error in the record.

JUDGMENT AFFIRMED.

Mr. Justice STRONG dissented from this judgment and from the preceding opinion respecting the construction and legal effect of the written agreement between the parties.

Mr. Justice HUNT also dissented.

WILLIAMS *v.* BAKER.

CEDAR RAPIDS RAILROAD CO. *v.* DES MOINES NAVIGATION CO.

1. The history given of the legislation of the land grants for the improvement of the Des Moines River, and of the grants for railroad purposes, which have been supposed to conflict.
2. This court on full consideration affirms the decision in the cases of *Wolcott* v. *The Des Moines Company* (5 Wallace, 681), and *Reily* v. *Wells* (declared by this court to have nothing to distinguish it from that case, and therefore not reported), namely, "that the title to those lands never passed to the railroad company by the grant under which it claimed, because, by the express terms of the proviso, they were reserved from the grant; and that by the Joint Resolution of Congress of 1861, and the act of 1862, on the same subject, the State of Iowa did receive the title for the use of those to whom she had sold them as part of the original Des Moines River grant."
3. The decision of *Wolcott* v. *The Des Moines Company*, as an authoritative exposition of the law of this case, is not weakened by the supposed collusion of the parties to that suit, it being shown by the record that all the questions were fully argued by other parties who intervened, and that the court maturely and deliberately considered the question which they were now asked to reconsider. Nor does this court look with approval upon a labored effort to prove by testimony that its judgment was obtained by collusion, when the judgment is cited in another case only to establish principles of law, and not by way of evidence or estoppel.

[Though the two cases here reported were decided in order of time prior to that of the *Homestead Company* v. *Valley*

Railroad next in order of place (beginning on page 153), and are referred to in it, yet the reader who is not already acquainted with the facts of what is known in Iowa as the Des Moines River land litigation may, possibly, find it as well to read, before reading the cases now immediately given, the later one, beginning, as already said, on page 153, and in which a diagram will assist his comprehension of a topography common to both cases.]

ON appeals from the Circuit Court for the District of Iowa.

These were two suits in chancery, brought originally in the State courts of Iowa, and transferred to the Circuit Court of the United States for that district, to quiet title to real estate. In the first case the complainant was Baker, who held title under the Des Moines Navigation and Railroad Company. The defendant was Williams, and he held under the Cedar Rapids Railroad Company. In the second case, the Cedar Rapids Railroad Company was complainant, and the Navigation and Railroad Company, with others, defendants; and in this suit the complainant set up that suits at law had been commenced against numerous persons, its grantees, which were harassing and expensive, and prayed that its title and the title of its said grantees should be quieted. The defendants in that suit denied the title thus set up, and alleged that their own title, that of the Des Moines Navigation and Railroad Company, was the true title. The court below decided, in both cases, in favor of the parties claiming under the latter title, and in both cases the adverse side appealed to this court.

Messrs. I. Cook and B. R. Curtis, for the title under the Cedar Rapids Railroad Company; *Mr. T. F. Withrow, contra*, for that under the Des Moines Company.

Mr. Justice MILLER delivered the opinion of the court.

The foundations of the title on each side of this controversy rest on acts of Congress, and the decision of the cases requires their construction. The cases are identical, except that as the holder of each of the conflicting titles becomes

plaintiff in turn, he is thrown upon the strength of his own title, rather than the weakness of the opposing one.

The title of Baker has its inception in the act of August 8th, 1846, the material part of which is in these words:

"There is hereby granted to the Territory of Iowa, for the purpose of aiding said Territory in improving the navigation of the Des Moines River from its mouth to the Raccoon Fork, so called, in said Territory, one equal moiety in alternate sections of the public lands remaining unsold and not otherwise disposed of, incumbered, or appropriated, in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents, to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

It was also provided that the lands should become the property of the State of Iowa on her admission as such into the Union, which was soon expected.

The State of Iowa passed laws for the work of improving the navigation of the river, which contemplated a series of locks and dams, and after prosecuting the work for some time under a State board of public works, made a contract with a corporation called the Des Moines Navigation and Railroad Company for the further progress of this improvement. By this contract the lands of the Congressional grant, which constituted the sole fund for making the improvement, were to be conveyed by the State to the company, at fixed prices, as they earned them in the progress of the work.

The Secretary of the Treasury, as the lands were selected by the agent of the State and the selections approved by him, certified the approved lists to the State, and this was, and always has been, considered the appropriate mode of evidencing the title of the State under the grant. The State conveyed by patent to the navigation company the lands so certified as the progress of the work authorized it, according to the terms of the contract. All the lands in controversy here have been so certified to the State by the Secre-

tary of the Treasury, or of the Interior, to which department, on its organization, that matter was transferred.

But in the progress of the work, and after the lands lying between the mouth of the river and the Raccoon Fork had been nearly or entirely exhausted, a question arose in the land department whether the grant included any lands above that point. This was a very important question, for, if it did not, the whole scheme was a failure, much the larger portion of the lands below that point having been entered by individuals before the passage of the act, and the river being quite as long, or longer, above the fork, and within the State, than below.

This question was the subject of opposing decisions by at least three secretaries and as many attorneys-general, and occupied several years of negotiation between the State and the department. At one period of the controversy the lands were all certified to the State by the secretary, Mr. Stuart.

While this controversy was going on between the State of Iowa and the department, Congress passed the act of 1856, which will be more fully considered hereafter as the source of title of the Cedar Rapids Company, by which there was granted to the State of Iowa alternate sections of land for building several railroads across the State east and west, which roads run through the lands we have been speaking of as in controversy under the act of 1846.

In 1857 or 1858, Mr. Litchfield, who had such title as the navigation company could give under the State of Iowa, brought a suit in the Circuit Court of the United States to recover possession of a tract of these lands, in which he was resisted by the Dubuque and Pacific Railroad Company, one of the beneficiaries under the railroad grant of 1856, and that suit coming to this court,* it was here held that the original grant did not extend above the Raccoon Fork, and that the acts of the Secretary of the Interior in certifying such lands to the State of Iowa were void and conferred no title, and that Mr. Litchfield had none.

* 20 Howard, 66.

This decision was received as a final settlement of the long-contested question of the extent of the grant. But it left the State of Iowa, which had made engagements on the faith of the lands certified to her, in an embarrassed condition, and it destroyed the title of the navigation company to lands of the value of hundreds of thousands of dollars, which it had received from the State for money, labor, and material actually expended and furnished. What was also equally to be regretted was, that many persons, purchasers for value from the State or the navigation company, found their supposed title an invalid one.

This decision was made and published in 1860, and to remedy the grave evils above mentioned, Congress, on the 2d day of March, 1861, passed a joint resolution in the following words:

"*Resolved*, That all the title which the United States still retain in the tracts of land along the Des Moines River, and above the mouth of the Raccoon Fork thereof, which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress, approved August 8th, 1846, and which is now held by *bonâ fide* purchasers under the State of Iowa, be, and the same is hereby relinquished to the State of Iowa."

To show still further the intention of Congress to make good to the State as far as possible all that was claimed by her under the original grant, Congress passed an act, approved July 12th, 1862, by which the grant was in express terms extended to the northern boundary of the State, and as some of the lands had been sold by the United States, provision was made for the selection of an equal quantity of lands of the government in any other part of the State.

This legislative history of the title of the State of Iowa, and of those to whom she had conveyed the lands certified to her by the Secretary of the Interior as part of the grant of 1846, including among her grantees the Des Moines Navigation and Railroad Company, needs no gloss or criticism to show that the title of the State and her grantees is per-

fect, unless impaired or defeated by some other and extrinsic matter which would have that effect.

Such matter is supposed to be found in the act of 1856, already referred to, granting lands to the State of Iowa to aid in building railroads. The argument is, that as by the true construction of the act of 1846 none of the lands above the Raccoon Fork were granted for the improvement of the river, the grant of 1856 covered all the lands erroneously certified to the State under the former, which came within the descriptive terms of the latter grant.

This argument is undoubtedly sound so far as it goes, upon the theory that the State of Iowa had no title in 1856 to the lands in question, and that it was in the power of Congress to grant the lands to railroads. And the whole argument may be simplified and the question at issue narrowed by the concession, that unless these lands are excepted out of the grant of 1856 by a proviso in that act, the railroad companies did get the title of the government by that act, and by the subsequent location of their lines of road so as to include the lands in controversy.

That proviso is in the following language:

"*And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same is hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The effect of this proviso upon the title asserted in these suits under the railroad companies, to the lands certified to the State of Iowa as part of the river improvement grant, has been passed upon by this court in three different cases, and in each of them it has been held that all these lands were, at the time of the passage of the act of 1856, *reserved* within the meaning of the proviso, and that therefore no

title passed to the State or to the railroad companies. It is not pretended that any title has been acquired by any other grant, or in any other manner.

It would seem that this should close the present controversy without further argument. But counsel have not hesitated to ask a reconsideration of the principles involved in those decisions; and the great value of the lands, the title to which must be governed by them, as well as the character of some of the reasons urged against their conclusiveness, have induced us to listen attentively to the oral argument on that subject, and to consider with deliberation and care all that has been presented on that point in writing.

The first and the leading case on the subject is that of *Wolcott* v. *The Des Moines Company.** It was a suit brought by Wolcott against the Des Moines Navigation Company, on a covenant of warranty of title, which it was alleged had failed under the decision in the case of *Litchfield* v. *The Dubuque and Pacific Railroad Company.* This court, in the Wolcott case, decided two propositions: 1st, that by reason of the proviso in the act of 1856 the railroad companies acquired no title to these lands; and 2d, that by the joint resolution of 1861 the title erroneously certified to the State, under the act of 1846, was validated and made good, and that therefore Wolcott had no cause of action on his covenant of warranty.

It is now said that Wolcott and the navigation company were in collusion to procure this decision, there being no real contest between them, and that the object was to procure from this court a decision adverse to the title of the railroad companies, none of whom were parties to the suit. Much evidence is found in the record of the cases now before us as heard in the Circuit Court to establish and to refute this allegation. We do not here intend to pass upon it, and we must be permitted to question both the taste and legal competency of testimony offered in an inferior court, to show that a decision in this court was obtained by fraudulent de-

* 5 Wallace, 681.

vices, when that decision is not relied on as evidence of any fact, or pleaded as an estoppel, but merely because it may be referred to as settling a principle of law applicable to the case at bar.

There is in the record of that case, as it remains in this court, sufficient answer to this objection to the opinion as an authority on the law of this case.

The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides, he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested.

They did intervene. The case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel, on the very question now under consideration, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question in the fact that there was submitted at the same time the case of *Burr* v. *The Des Moines Navigation and Railroad Company* on a similar warranty of title. Now, though both suits were decided in the Circuit Court for the Southern District of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference, which was the very point now under consideration.

The same question precisely came up shortly afterwards in the case of *Harriet Reily* v. *W. B. Wells*, and was again

fully argued, and from the opinion of the court, which remains on file, though unreported, the following language is taken: "The reasons for this withdrawal of the lands from public sale, or private entry, are stated at large in the opinion of the court in *Wolcott* v. *The Des Moines Company*, and need not be repeated. The point of the reservation was very material in that case, and we have seen nothing in the present one, either in the facts or in the arguments, to distinguish it." Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott* v. *The Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well-considered cases.

We do not propose to review or add to the able and, to us, satisfactory argument of the judge who delivered that opinion, as well as the one in *Reily* v. *Wells*, but will notice the only new legal proposition advanced by counsel in the present case.

It is attempted to be shown that the proviso on which so much depends was one which in almost the same words it has been usual to insert in all grants of a similar character by Congress. And it is argued that, therefore, it could have no special reference in the mind of Congress to the lands certified under the act of 1846. If, however, this were conceded, it must remain true that the effect of the proviso was to cover such cases as came within its terms, whether known or unknown to Congress, and the opinion in the case referred to shows how distinctly those lands did come within the language and spirit of the proviso. So clear is this that it still seems to us that Congress did know of this reservation, and did intend to protect it as stated in that opinion.

We, therefore, reaffirm, first, that neither the State of Iowa, nor the railroad companies, for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines River grant of 1846; and, second, that by the joint resolution of 1861,

and the act of 1862, the State of Iowa did receive the title for the use of those to whom she had sold them as part of that grant, and for such other purposes as had become proper under that grant.

The decrees in both cases are accordingly

AFFIRMED.

Mr. Justice DAVIS did not take part in this decision, on account of a supposed interest in the question; and Mr. Justice BRADLEY did not sit on the hearing.

HOMESTEAD COMPANY v. VALLEY RAILROAD.

1. In this case the court decides, for the fifth time, that neither the State of Iowa nor any railroad company for whose benefit the act of Congress of May 15th, 1856 (11 Stat. at Large, 9), was made, took any title to the lands then claimed by the Des Moines Navigation and Railroad Company, under what is known as the River Grant of August 8th, 1846 (6 Id. 77); and that the joint resolution of March 2d, 1861 (13 Id. 543), and the act of July 12th, 1862 (12 Id. 25), on this subject transferred the title from the United States and vested it in the State of Iowa for the use of its grantees under the said River Grant.
2. Neither the railroad companies nor their grantees, as respected any lands granted by the said act of May 15th, 1856, or by the act of the legislature of Iowa, passed July 14th, 1856, were *cestui que trusts* of what are called the Indemnity Lands, which were granted by the act of Congress of July 12th, 1862; nor in view of the action of the officers of Iowa and of the Federal government on the subject, and of the subsequent legislation of the said State and of Congress on it, were they entitled otherwise to any portion of those lands.
3. A party who has no title to lands cannot acquire one by mere payment of taxes on them.
4. A party by paying taxes which another party ought to pay, but does not pay, cannot make such second party his debtor by having stepped in and paid the taxes for him, without being requested so to do.

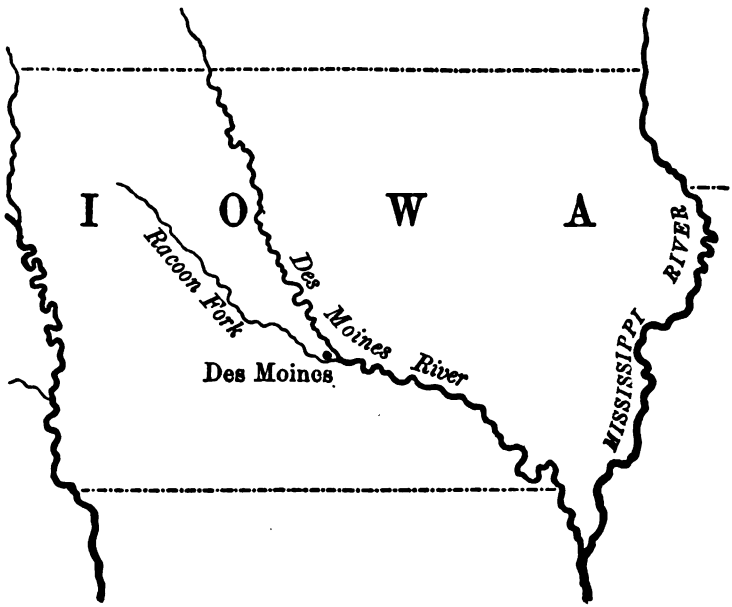
APPEAL from the Circuit Court for the District of Iowa; the case being thus:

On the 8th of August, 1846, Congress granted* to the then Territory, and now State, of Iowa—

* 9 Stat. at Large, 77.

Statement of the case.

"For the purpose of aiding said Territory to improve the navigation of the Des Moines River, from its mouth to the Raccoon Fork, so called, in said Territory, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width, on each side of said river."



The second section of this act provided that the lands so granted should not be sold or conveyed by the Territory, nor by any State to be formed out of it, except as the improvements progressed; that is, that sales might be made so as to produce the sum of $30,000, and then cease until the governor of the Territory, or State, as the case might be, should certify to the President of the United States the fact that one-half of this sum had been expended on said improvements, when sales again might be made of the remaining lands sufficient to replace this amount. The sales were thus to progress as the proceeds were expended, and the expenditure so certified to the President.

After this grant to the State of Iowa, sometimes called

"the river grant," the legislature incorporated the Des Moines Navigation and Railroad Company, for the purpose of carrying out the improvement for which the lands had been granted; and the lands, with some exceptions, stated *infra*, page 157, were conveyed to that company.

Somewhere near the middle of the State, at Des Moines City, the Des Moines River receives as a tributary a stream called the Raccoon Fork. It thus happens that about one-half the river is above the point where this fork enters and one-half below. Each half traverses, of course, a region of great extent and value.

From the phraseology of the above-quoted grant of Congress, it is obvious that a controversy was susceptible of being raised; the point open to question being, whether Congress meant to grant to the State land on the Des Moines River above the *point* where the Raccoon Fork enters, as well as the land below this point, or whether it meant to grant only land below. On the one hand, the grant was for the purpose of improving the navigation of the river "from its mouth TO the Raccoon Fork." On the other, the grant itself was of one equal moiety, &c., "on each side of the said river."

As early as February, 1848, a controversy assumed form: and what was the true meaning of the grant was a question which came before a succession of officers of the United States, commissioners of the land office, secretaries of the treasury, secretaries of the interior, and attorneys-general. Some of these thought that the grant did not extend above the fork. Others, including Mr. A. H. Stuart, Secretary of the Interior (the department to which the subject primarily belonged), was of the opinion that it did, and certified the lands above as though that were the true construction of the grant.

The agents of the State, who had been appointed by the governor to select the sections designated by odd numbers, selected them from the mouth of the river towards the northern boundary of the State as far as surveyed; in other words, above the fork as well as below.

Statement of the case.

On the 15th of May, 1856, Congress, by act of that date,* granted to the State of Iowa, for the purpose of aiding in the construction of certain railroads specified (including the Dubuque and Pacific Railroad), every alternate section of land for six sections in width on each side of said roads. Standing without any restriction, this grant, as the road named was laid out, would have embraced certain tracts which, if the act of the 8th of August, 1846, rightly construed *did* include tracts *above* the fork, had been granted under that act for the improvement of the navigation of the Des Moines River. But the grant did not stand without restriction. On the contrary, it contained a reservation, thus:

"*Provided*, that any and all lands heretofore reserved to the United States by any act of Congress, *or in any other manner by competent authority*, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

If, therefore, Mr. Stuart and the Department of the Interior, and the officers of the Federal government, who had acted on the idea that the grant included lands above the fork, and reserved them to the United States for the purpose of aiding the improvement of the Des Moines River, were "competent authority," within the meaning of this act, then to whomsoever else they passed or did not pass, those lands did *not* pass to the State under this act of May 15th, 1856, for the benefit of its railroads. But herein, again, it is obvious was a field for controversy.

Whatever the reservation or proviso to the act might mean, the State of Iowa, by act of July 14th, 1856, accepted the act and, without describing any lands particularly, enacted that the lands granted by the act "are hereby disposed

* 11 Stat. at Large, 9.

of, granted, and conferred to and upon the Dubuque and Pacific Railroad Company." After this the lands were treated by the railway company as belonging to it, and on the 7th of April, 1863, the Commissioner of the General Land Office and Secretary of the Interior approved these specific lands to the railroad grant, and they were certified to the State on that day, as part of the railway grant. The railway company now paid the taxes.

Here then the two companies—the navigation company on the one hand and the railroad company on the other were put in antagonism. A question to be decided was this, "Did the grant of the 8th August, 1846, which was now represented by the navigation company, pass lands *above* the fork?"

[To preserve, however, in a chronological order, the chain of certain events hereinafter referred to, we will here, at the apparent expense of unity of subject, mention that on the 22d of March, 1858, the legislature of Iowa, having sold a portion of the lands granted by the act of August 8th, 1846, and being about to convey certain other portions to the Des Moines Navigation Company, granted, by an act, all the residue of them, and "all lands and compensation which may be given in extension, *or in lieu of any portion thereof, by the General Government*, to the Keokuk, Fort Des Moines, and Minnesota Railroad Company (whose name was subsequently changed to the Des Moines Valley Railroad Company);" the grant to become operative so soon as Congress shall assent to or permit a diversion, or the title thereto shall become vested in the State so as to be subject to a grant.*]

To come back, however, now, to the question about the extent of the grant.

That question got before this court A. D. 1860, in *The Dubuque and Pacific Railroad* v. *Litchfield*,† where it was finally decided that the grant carried nothing above the fork. This question, therefore, was at an end. But it did not follow

* This assent was given by the act of Congress of July 12th, 1862. See *infra*, p. 158.

† 23 Howard, 66.

from this that any of the lands above had passed to the railroad company under the act of the 15th May, 1856. That was another question, and whether or not they had so passed would depend on the effect of the proviso or reservation in that act; a matter then as yet judicially unsettled.

As soon as the decision in *The Dubuque and Pacific Railroad* v. *Litchfield*, deciding that the navigation company, under the grant of the 8th of August, 1846, took no lands *above* the fork, was announced (which it was in 1860), Congress passed first a joint resolution,* and then an act,† to counteract its effects.

The joint resolution, which bore date March 2d, 1861, was thus:

"*Resolved*, &c., That all the title which the United States still retain in the tracts of land along the Des Moines River and above the mouth of the Raccoon Fork thereof, which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress, approved August 8th, 1846, and which is now held by *bonâ fide* purchasers under the State of Iowa, be, and the same is hereby relinquished to the State of Iowa."

The act of Congress, which was approved 12th of July, 1862, was thus:

"*Be it enacted*, That the grant of lands to the then Territory of Iowa for the improvement of the Des Moines River, made by the act of August 8th, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said State. Such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines, and Minnesota Railroad [subsequently called the Des Moines Valley Road], in accordance with the provisions of the act of the General Assembly of the State of Iowa, approved March 22d, 1858."‡

* 12 Stat. at Large, 251. † Ib. 548.

‡ See mention of this act, *supra*, p. 157.

Statement of the case.

The act then went on further to say:

"And if any of said lands shall have been sold or otherwise disposed of by the *United States*, before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa under the joint resolution of March 2d, 1861; the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State, to be certified in lieu thereof. Provided that if the said *State* shall have sold and conveyed any portion of the lands lying within the limits of this grant, *the title of which has proved invalid*, any lands which shall be certified to said State, in lieu thereof, by virtue of the provisions of this act, shall inure to and *be held as a trust fund* for the benefit of the person or persons respectively, whose title shall have failed as aforesaid."

This act having been passed, an agent of the State of Iowa and the Commissioner of the General Land Office met, and on an assumption that the lands above the fork *meant* to be given by the act of Congress, July 12th, 1862, for the improvement of the Des Moines River, had been granted to the Dubuque and Pacific Railroad Company by the act of May 15th, 1856, agreed "that the United States had sold and otherwise disposed of a certain quantity of land prior to the passage of the said act [of July 12th, 1862], for which the State was entitled to indemnity under the act aforesaid;" and, entering into negotiations, finally made an adjustment of things by which a large quantity of lands were certified to the State as indemnity for the lands which, upon the representations of the agent of Iowa, the United States admitted had been disposed of by it under the grant of May 15th, 1856, for railroad purposes. And this action of the commissioner, made May 21st, 1866, was approved by the Secretary of the Interior on the next day.

Soon after this adjustment, that is to say, in the spring of 1867, this court, in the case of *Wolcott* v. *Des Moines Company*,* decided that the lands which had been reserved by the action of so many principal officers of the United States,

* 5 Wallace, 681.

including Mr. Stuart, Secretary of the Interior, had been reserved by "competent authority," within the meaning of the proviso in the act of May 15th, 1856, and decided again the same thing in *Des Moines Navigation Company* v. *Burr*,* and yet again in *Harriet Riley* v. *W. B. Wells*, a case which the reporter did not, in view of two previous decisions, think it necessary to report.

As under each one of these decisions the court decided that the United States had not, by its act of the 15th of May, 1856, given anything away to the State for the benefit of its railroads which, even assuming that the act of the 8th of August, 1846, carried lands *above* the fork, would have belonged to the navigation company—or, as, in other words, it decided that there was, so far as the act of May 15th, 1856, was concerned, no ground for indemnity to the State of Iowa for a loss to the navigation company, the State was now naturally prompt to ratify the action of its own agent and of the Federal officers, who had acted on a different supposition of the effect of the proviso or reservation; and on the 31st of March, 1868, the State, accordingly, by act of legislature, did ratify and confirm their action.

Congress equally, on the 3d of March, 1871, notwithstanding the decisions above mentioned, by act of the date just mentioned† enacted:

"That the title to the land certified to the State of Iowa by the Commissioner of the General Land Office, under the act of July 12th, 1862, in accordance with the adjustment made by the authorized agent of the State of Iowa and the Commissioner of the General Land Office, May 21st, 1866, and approved by the Secretary of the Interior May 22d, 1866, and which adjustment was ratified and confirmed by the State of Iowa March 31st, 1868, be, and the same is ratified and confirmed to the State of Iowa and *its grantees*, in accordance with said adjustment and said act of the General Assembly of the State of Iowa."

Thus, as the reader will perceive, the summing up of everything, including all the legislation, and all the decisions, ended with these results:

* 5 Wallace, 681.

† 16 Stat. at Large, 582.

The navigation company got its alternate sections *above* the fork:

The Des Moines Valley Railroad (succeeding to the Keokuk, Fort Des Moines, and Minnesota Railroad) got the body of the "indemnity lands," which had been granted to the State for the improvement of the river, on the assumption that the navigation company (owing to the Congressional grant of May 15th, 1856) had *not got* them:

While the Dubuque and Pacific Railroad Company, for whose *erroneously supposed* taking away, under the grant just mentioned, from the navigation company of lands above the fork, the indemnity lands had been granted to the said navigation company, got—nothing at all.

The Homestead Company (to which it ought to have been earlier said that the Dubuque and Pacific Railroad Company had granted its rights, and who, with it, had paid $80,000 taxes on the lands) now accordingly filed its bill in the court below, against the navigation company, the Valley Railroad Company, and others, setting up—

1st. (And in the face of what was decided in *Wolcott* v. *Des Moines Company* and the two other cases) that the act of May 15th, 1856, did carry to it the lands above the fork.

2d. That if this was not so, then that they were holders of titles under the State, which had failed within the meaning of the proviso in the act of July 12th, 1862, and so *cestui que trusts* for a portion of the indemnity lands granted by it.

3d. That if they were not such holders, and not so entitled, they were nevertheless entitled to a portion of those lands, because the said lands had been certified to the navigation company or its grantees upon the assumption that the river lands had been granted by the act of May 15th, 1856, to the railroad company; a matter now decided not to have been true in fact or law.

The court below dismissed the bill and the Homestead Company took this appeal.

Mr. James Grant, for the appellants; Messrs. J. F. Withrow, C. C. Nourse, and E. C. Litchfield, contra.

Opinion of the court.

Mr. Justice DAVIS delivered the opinion of the court.

This case presents another phase of the Des Moines River land litigation.

The main question involved in this case is the question of title to the Des Moines River lands, which was settled several years ago by the decision in the cases of *Wolcott and Burr*,* and in the subsequent and unreported case of *Riley* v. *Wells*, adversely to the title set up by the appellants. At the present term of this court, the principles involved in these decisions have been reconsidered and reaffirmed.† It is therefore no longer an open question that neither the State of Iowa nor the railroad companies, for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines River grant of 1846, and that the joint resolution of 2d of March, 1861, and act of 12th of July, 1862, transferred the title from the United States and vested it in the State of Iowa for the use of its grantees under the river grant. If so, the claim of title by the appellants, who are grantees under one of these railroad companies, to the lands certified to the State of Iowa, under the act of August 8th, 1846, above the Raccoon Fork of the Des Moines River, has no foundation to rest upon.

But the appellants insist if they cannot recover these lands they are *cestui que trusts* for a portion of the indemnity lands obtained by the State under the act of July 12th, 1862. Congress by this act extended the grant originally made to the State in 1846, for the improvement of the Des Moines River, so as to include the alternate sections of land (designated by odd numbers) between the Raccoon Fork and the northern boundary of the State, and consented that a portion of these lands should be applied to the construction of a railroad, which, by change of name, is called the Des Moines Valley Road.

This legislation was intended to put the State in exactly the position it would have been, if there had been no dis-

* 5 Wallace, 681.

† Williams v. Baker, *supra*, p. 144.

pute as to the extent of the grant in 1846, and accordingly the Secretary of the Interior was directed if any of the lands within the granted limits should have been sold or otherwise disposed of by the United States before the passage of the act, to set apart an equal quantity elsewhere in the State in lieu thereof.

In case the State also had sold and conveyed any of these lands, the title to which had proved invalid, the act directed that the land set apart by the Secretary of the Interior should be held in trust for the benefit of those persons whose titles had thus failed. This latter provision was rendered necessary by the conflict in opinion which had for a series of years existed concerning this river grant. The State had always maintained that the original grant, properly construed, extended above the Raccoon Fork, while on the contrary, the United States had at different times both denied and admitted the claim of the State. It was to be expected in this condition of the dispute that both the State and General Government had disposed of a portion of these lands. If so, and the title of the grantees of the State had proved invalid, it was eminently proper that they should be protected, and there was no better way to do this than to require the State, in the first instance, to use the indemnity lands for this purpose.

It is admitted in the record that the State has conveyed to the Des Moines Valley Railroad Company, one of the defendants in this suit, for good and valuable considerations performed by the company, all the lands received by the State under the act in question, except those only which had been conveyed by the State under the act of August 8th, 1846, and the legislation pursuant thereto.

The inquiry arises, whether the State, at the time of the passage of the act of 12th of July, 1862, had conveyed to the grantor of the appellants any portion of the lands lying within the river grant. If not, they are not within the purview of the act, for they have not suffered any loss by reason of any transaction with the State, and are, therefore, not in a position to claim compensation. The Iowa legislature, by

the act of July 14th, 1856, conveyed to the Dubuque and Pacific Railroad Company, the grantor of the appellants, the lands granted to the State by the act of Congress of May 15th, 1856. The conveyance did not specify any particular lands, but in a general way transferred to the company all the rights and interests which the State received from the United States under this grant. If, therefore, the river lands were not granted to the State by the act in question, they were not embraced in the conveyance which the State made to the company, and the State, therefore, has not broken its engagement with the company. This court having decided and reaffirmed the decision that the grant of 1856 did not include the lands claimed by the State to belong to the river improvement, it is difficult to see on what grounds the appellants can rest their right to indemnity under the act of July 12th, 1862, for they cannot be *cestui que trusts*, as they never had any title which has proved invalid.

But the appellants insist if they are not the holder of any titles which have failed within the meaning of the act of July 12th, 1862, they are, nevertheless, entitled to a portion of the indemnity lands certified to the State under that act, because they were certified upon the assumption that the river lands had been granted by the act of May 15th, 1856. It is undoubtedly true that in 1866, on this theory, the State of Iowa, through its authorized agent, made an adjustment with the Commissioner of the General Land Office, by which a large quantity of lands were certified to the State, as indemnity for the lands which it was claimed had been disposed of by the United States by the grant for railroad purposes in 1856. It is equally true that the construction by these officers of the different acts of Congress relating to this subject, by which this result was obtained, was erroneous, as we have held in three different cases. But the decision in Wolcott's case, the first of the three, was not then announced, and the adjustment was doubtless induced by the decision in Litchfield's case, that the river grant did not extend above the Raccoon Fork. Whatever may have caused

the adjustment, it is quite apparent, as the lands were erroneously certified under the act of July, 1862, that something more was needed than the action of the land commissioner, fortified as it was by the approval of the Secretary of the Interior, to pass a valid title to the State and its grantees. That which was requisite to accomplish this object was obtained by the legislation of the State and of Congress. The legislature of Iowa, in March, 1868, on the performance of certain conditions, directed a conveyance to be made to the Des Moines Valley Railroad for all the lands embraced in the act of Congress, approved the 12th of July, 1862, and ratified the adjustment made with the Commissioner of the General Land Office. In accordance with this legislation the lands in controversy were patented by the State to the company, the conditions imposed upon the company before this could be done having been complied with. Although the ratification of the adjustment and the grant to the Valley Railroad would seem to be inconsistent acts, yet Congress, with full knowledge on the subject, on the 3d of March, 1871, confirmed the title to the State and its grantees. It is true the law by which this is done, says it is in accordance with the adjustment, and the act of the General Assembly of Iowa, but, as we have seen, this act not only ratified the adjustment, but also granted the lands to the Valley Road.

Indeed, the main purpose of the act was to secure the construction of the road, by the transfer to it of the lands obtained under the adjustment. Whether the State of Iowa in the disposition which it made of these lands, conformed to the adjustment, is not a question for us to consider.

This consideration was properly addressed to Congress, who, with full knowledge that the legislature had parted with the lands to the Valley Road, chose to confirm the title to "the State and its grantees."

If Congress had withheld its consent to what the State had done, neither the State nor the road would have taken anything by the action of the officers certifying the lands.

This was also known to Congress, because the decision in Wolcott's case was then before the country.

Congress, therefore, with full information that the State of Iowa was not entitled to these indemnity lands by reason of any previous legislation, thought proper, nevertheless, to give them to the State, knowing at the time that they were to be used in building a railroad along the line of the Des Moines River. It had already consented that a part of the lands originally designed for the improvement of this river by locks and dams, should be applied to the construction of this road, and was doubtless induced to give the direction it did to the indemnity lands, because it was satisfied that further aid was necessary to secure the completion of the Valley Road, while the east and west roads were either completed or nearly so. If we are correct in these views there is an end of this controversy, because Congress had the undoubted right to dispose of these lands for such purposes as in its judgment might best subserve the public interests, and having decided this question for itself, the Homestead Company is not in a position to question the authority of that decision. As the grant in 1856 did not cover the river lands in place, this corporation is not within the terms of the act of July 12th, 1862, and have, therefore, no rights which either the State or Congress were bound to respect.

It must be conceded that its expectation to share in the result of the adjustment concluded between the authorized agent of the State and the land department of the General Government was reasonable under the circumstances; but this expectation was not founded on any legal right, and cannot, therefore, be the subject of judicial inquiry.

It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the

land, and with a full knowledge of all the facts. It is an elementary proposition, which does not require support from adjudged cases, that one person cannot make another his debtor by paying the debt of the latter without his request or assent.

It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well-established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title, have risked too much, it is their misfortune, but they are not on that account entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit.

DECREE AFFIRMED.

Mr. Justice MILLER took no part in this decision.

NOTE.

At the same time with the preceding was adjudged another, *Crilley* v. *Burrows*, which the court said (Mr. Justice DAVIS delivering the opinion) was "in no essential respect different from it;" and had "no principle which had not already been passed upon by this court in some one of the suits relating to this protracted litigation." On this account it is no further reported.

UNITED STATES v. COOK.

1. Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence, that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. But if the language of the section defining the offence is so entirely separable from the exception, that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defence, and to be shown by the accused.
2. No exception or proviso of any kind is contained in the act of Congress of August 6th, 1846 (9 Stat. at Large, 68), making a paymaster in the army who embezzles public money, guilty of felony.
3. Therefore, a statute of limitations cannot be taken advantage of by demurrer.
4. The 82d section of the act of April 30th, 1790 (sometimes called the Crimes Act), enacts the only limitation applicable to the offence of a paymaster of the army, indicted for embezzling the public money.

ON certificate of division of opinion of the judges of the Circuit Court for the Southern District of Ohio; the case being thus:

The 16th section of the act of August 6th, 1846,* enacts:

"That all officers and other persons charged . . . with the safe-keeping, transfer, and disbursement of the public moneys . . . are hereby required to keep an accurate entry of each sum received, and of each payment or transfer; and that if any one of said officers . . . shall convert to his own use . . . any portion of the public moneys intrusted to him for safe-keeping, disbursement, or transfer, . . . every such act shall be deemed to be an embezzlement of so much of the said moneys as shall be thus . . . converted, . . . which is hereby declared a felony; . . . and any officer or agent of the United States convicted thereof shall be sentenced to imprisonment for a term of not less than six months, nor more than ten years, and to a fine equal to the amount of the money embezzled."

* 9 Stat. at Large, 68.

Statement of the case.

The 32d section of an act of April 30th, 1790,* entitled "An act for the punishment of certain crimes against the United States," thus enacts:

"No person shall be *prosecuted*, *tried*, or *punished* for any offence not capital, unless the indictment or information for the same shall be found or instituted within *two years* from the time of committing the offence, &c. *Provided* that nothing herein contained shall extend to any person or persons fleeing from justice."

The 3d section of an act of 1804,† entitled "An act in addition to the act entitled," &c. (as above), thus further enacts:

"Any person or persons guilty of any crime arising under the *revenue laws* of the United States . . . may be prosecuted, tried, and punished, provided the indictment . . . be found *at any time within five years after committing the offence*, any law or provision to the contrary notwithstanding."

These statutes being in force, one Cook was indicted in the court below at October Term, 1864, for the embezzlement of funds held by him as paymaster in the army of the United States.

The indictment was filed on the 1st of November, 1864; and the first five counts charged acts of embezzlement on the 1st of May, the 6th of July, the 15th of October, the 12th of September, and the 20th of September, in the year 1862.

The defendant demurred to these counts, because it appeared upon the face of them, severally, that the crime charged was committed more than two years before the finding and filing of the indictment, and that the prosecution therefor was, before the finding and filing of the indictment, barred by the statute in such cases made and provided.

Three questions now arose on which the judges were opposed in opinion, and which they accordingly certified for answers by this court:

First. Whether it was competent for the defendant to take

* 1 Stat. at Large, 119.

† 2 Id. 290.

exception, by demurrer, to the sufficiency of the first five counts of the indictment for the causes assigned.

Second. Whether the said five counts, or either of them, allege or charge, upon their face, any crime or offence against the defendant for which he is liable in law to be put upon trial, convicted, and punished.*

Third. Whether the 32d section of the act of 1790, sometimes called the Crimes Act, applied to the case, and limited the time within which an indictment must be found for such an offence, or whether in regard to the period of limitation, within which an indictment was to be found, the case was governed by the act of 1804, or any other act limiting the prosecution of offences charged in the said five counts.

Messrs. Hunter, Kebler, and Whitman, for the prisoner:

1. *The demurrer should be sustained.*

In all prosecutions for crime, the indictment must, upon its face, show that the defendant is charged with a crime. He is called to answer to the charge alleged against him, and to *nothing else.* And it follows if the indictment upon which a party is charged, do not, upon its face, in terms, embody a charge of crime, it is the duty of the court, at any stage of the prosecution, and in any form whatever in which the want of such charge or allegation shall be brought to its notice, to desist from further exercising its jurisdiction over the defendant. This defect of the indictment may be shown, on motion to quash, or on demurrer, or it may be noted by the court, *sua sponte.* On principle the inability of the court to proceed extends to all classes of defects, whether in the substance of the act alleged as crime, not being such in law; or by reason of exemption of the defendant, by law, from prosecution under the facts alleged against him. It is not the *fact*, but the *allegation—the charge in the indictment*, that gives jurisdiction. If, taking the fact as charged, no crime

* Both of these questions were presented in the record as one, but as this court in its consideration of the matter divided the question into two parts, it is so here divided.

for which the defendant is liable, under the law, to be prosecuted, tried, and punished is charged, does it matter what the reason is?

There is, no doubt, some diversity of opinion on the subject, in criminal practice, in respect to the *manner* in which this defence of limitation may be taken advantage of, but there surely need not be any delicacy or hesitation about requiring the prosecution, *primâ facie*, to bring itself by proper allegations within the law, so far as to show a *primâ facie* case of crime, legally punishable under the law. Numerous cases,* including *Commonwealth* v. *Ruffner*,† and *Hatwood* v. *The State*,‡ affirm this view.

2. *The limitation of the act of* 1790, *and not that of the act of* 1804, *or any other, governs the case.*

A paymaster, or an additional paymaster in the army, intrusted with the funds of the government to be disbursed in the time of war, in the payment of the soldiers in the field, is not in any proper sense, or in any recognized acceptation of terms, in their practical or legal sense, a revenue officer.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Officers and other persons charged with the safe-keeping, transfer, and disbursement of the public moneys, are required by an act of Congress to keep an accurate entry of each sum received, and of each payment or transfer; and the sixteenth section of the same act provides that if any one of the said officers shall convert to his own use, in any way whatever, any portion of the public moneys, intrusted to him for safe-keeping, disbursement, or transfer, or for any other purpose, every such act shall be deemed and adjudged to be embezzlement of so much of the public moneys as

* State v. Bryan, 19 Louisiana Annual, 435; United States v Watkins, 3 Cranch's Circuit Court, 441, 442, 550; People v. Miller, 12 California, 291; McLane v. State, 4 Georgia, 335; People v. Santvoord, 9 Cowan, 655.

† 28 Pennsylvania State, 259.

‡ 18 Indiana, 492

Restatement of the case in the opinion.

shall be thus taken and converted, which is therein declared to be a felony; and the same section also provides, that all persons advising or participating in such act, being convicted thereof before any court of the United States of competent jurisdiction, shall be punished as therein provided.*

Founded on that provision, the indictment in this case contained six counts, charging that the defendant, as paymaster in the army, had in his custody for safe-keeping and disbursement, a large sum of public money, intrusted to him in his official character as an additional paymaster in the army, and that he, on the respective days therein alleged, did unlawfully, knowingly, and feloniously embezzle and convert the same to his own use. Such conversion is alleged in the first count, on the 1st of May, 1862, in the second on the 6th of July, in the third on the 16th of October, in the fourth on the 12th of September, in the fifth on the 20th of September, and in the sixth on the 15th of November, all in the same year. Service was made, and the defendant appeared and demurred to the first five counts, showing for cause, that it appears on the face of the indictment, and by the allegations of the said several counts, that the crime charged against him was committed more than two years before the indictment was found, and filed in court.

Three questions were presented by the demurrer for the decision of the court, upon which the opinions of the judges were opposed, in substance and effect as follows: (1.) Whether it was competent for the defendant to take exception, by demurrer, to the sufficiency of the first five counts of the indictment for the causes assigned. (2.) Whether the said five counts, or either of them, allege or charge, upon their face, any crime or offence against the defendant for which he is liable in law to be put upon trial, convicted, and punished. Both of those questions are presented in the record as one, but inasmuch as the answers to them must be different, it is more convenient to divide the question into two parts. (3.) Whether the thirty-second section of the Crimes

* 9 Stat. at Large, 68.

Act applies to the case, and limits the time within which an indictment must be found for such an offence.*

Forgery of public securities was made a capital felony by that act, as well as treason, piracy, and murder, and the thirty-second section of the act provides that no person shall be prosecuted, tried, or punished for treason or other capital felony, wilful murder or forgery excepted, unless the indictment for the same shall be found by the grand jury within three years next after the treason or capital offence shall be done or committed.†

Provision is also made by the succeeding clause of the same section, that no person shall be prosecuted, tried, or punished for any offence, not capital, unless the indictment for the same shall be found within two years from the time of committing the offence. Fines and penalties, under any penal statute, were also included in the same limitation, but that part of the clause having been superseded by a subsequent enactment, it is omitted.‡

Appended to the thirty-second section, enacting the limitation under consideration, is the following proviso: *Provided* that nothing herein contained shall extend to any person or persons fleeing from justice.§

Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained

* 1 Stat. at Large, 119. † Ib.

‡ 5 Id. 322; Stimpson v. Pond, 2 Curtis, 502.

§ 1 Stat. at Large, 119.

in the exception is matter of defence and must be shown by the accused.*

Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offence, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed.†

With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.‡

Text-writers and courts of justice have sometimes said, that if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defence and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offence may be so entirely separable from the exception that all the ingredients constituting the offence may be accurately and clearly alleged without any reference to the exception.§

Cases have also arisen, and others may readily be sup-

* Steel v. Smith, 1 Barnewall & Alderson, 99; Archbold's Criminal Pleading, 15th ed. 54.

† Rex v. Mason, 2 Term, 581.

‡ Archbold's Criminal Pleading, 15th ed. 54.

§ Commonwealth v. Hurt, 11 Cushing, 182.

posed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offence, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section, or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty.*

Support to these views is found in many cases where the precise point was well considered. Much consideration was given to the subject in the case of *Commonwealth* v. *Hart*,† where it is said that the rule of pleading a statute which contains an exception is the same as that applied in pleading a private instrument of contract, that if such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that otherwise would be included in it, a party relying upon the general clause in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception, but *if the exception itself is incorporated in the general clause* then the party relying on "the general clause must, in pleading, state the general clause together with the exception," which appears to be correct, but the reasons assigned for the alternative branch of the rule are not quite satisfactory, as they appear to overlook the important fact in the supposed case that the exception itself is supposed to be incorporated in the general clause.

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or

* State v. Abbey, 29 Vermont, 66; 1 Bishop's Criminal Proceedings, 2d ed., § 639, n. 8.

† 11 Cushing, 130.

private contract, that unless the exception in the general clause is negatived in pleading the clause, no offence, or no cause of action, will appear in the indictment or declaration when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a *primâ facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defence.

Commentators and judges have sometimes been led into error by supposing that the words "enacting clause," as frequently employed, mean the section of the statute defining the offence, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offence as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offence. Such an offence must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offence that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offence as to become a material part of the definition of the offence, then it is matter of defence and must be shown by the other party, though it be in the same section or even in the succeeding sentence.*

Both branches of the rule are correctly stated in the case of *Steel* v. *Smith*,† which was a suit for a penalty, and may perhaps be regarded as the leading case upon the subject. Separate opinions were given by the judges, but they were unanimous in the conclusion, which is stated as follows by the reporter: "Where an act of Parliament in the enacting

* 2 Leading Criminal Cases, 2d ed. 12; Vavasour v. Ormrod, 9 Dowling & Ryland, 599; Spieres v. Parker, 1 Term, 141; Commonwealth v. Bean 14 Gray, 53; 1 Starkie's Criminal Pleading, 246.

† 1 Barnewall & Alderson, 99.

clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption *which is not incorporated in the enacting clause by any words of reference*, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration." All of the judges concurred in that view, and Bayley, J., remarked that where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, there the exception must be negatived.

Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification.*

Few better guides upon the general subject can be found than the one given at a very early period, by Treby, C. J., in *Jones* v. *Axen*,† in which he said, the difference is that where an exception is incorporated in the body of the clause he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel* v. *Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated.

Apply those rules to the case before the court, and all difficulty is removed in answering the questions for decision. Neither an exception nor a proviso of any kind is contained

* Gurly v. Gurly, 8 Clarke & Finelly, 764; Minis v. United States, 15 Peters, 445; Stephen on Pleading, 9th Am. ed. 448.

† 1 Lord Raymond, 120.

in the act of Congress defining the offence, and every ingredient of the offence therein defined is accurately and clearly described in the indictment. Nothing different is pretended by the defendant, but the contention is that the demurrer does not admit the force and effect of these allegations, because another act of Congress provides that no person shall be prosecuted, tried, or convicted of the offence unless the indictment for the same shall be found within two years from the time of committing the offence.

Argument to show that a demurrer to an indictment admits every matter of fact which is well pleaded is unnecessary, as the proposition is not denied, and inasmuch as the offence is well alleged in each of the counts to which the demurrer applies, it is difficult to see upon what ground it can be contended that the defendant may, by demurrer, set up the statute of limitations as a defence, it appearing beyond all doubt that the act defining the offence contains neither an exception nor a proviso of any kind.

Tested by the principles herein suggested it is quite clear that such a theory cannot be supported, but it must be admitted that decided cases are referred to which not only countenance that view, but adjudge it to be correct. Some of the cases, however, admit that the judgment cannot be arrested for such a defect, if it appears that the statute of limitations contains any exception, as the presumption in that state of the case would be that evidence was introduced at the trial which brought the defendant within some one of the exceptions.*

Obviously the supposed error, if it be one, could not be corrected by a motion in arrest, for the reason suggested in those cases, and it is quite as difficult to understand the reason of the rule which affirms that a demurrer will work any such result, as it cannot be admitted that a demurrer is a proper pleading where it will have the effect to shut out evidence properly admissible under the general issue to re-

* State v. Hobbs, 39 Maine, 212; People v. Santvoord, 9 Cowen, 660; State v. Rust, 8 Blackford, 195.

but the presumption of the supposed defect it was filed to correct.

Suppose that is so, then it clearly follows that the demurrer ought not to be sustained in this case, as the statute of limitations in question contains an exception, and it may be that the prosecutor, if the defendant is put to trial under the general issue, will be able to introduce evidence to show that he, the defendant, is within that exception. Although the reasons given for that conclusion appear to be persuasive and convincing, still it is true that there are decided cases which support the opposite rule and which affirm that the prosecutor must so frame the indictment as to bring the offence within the period specified in the statute of limitations, or the defendant may demur, move in arrest of judgment, or bring error.*

Sometimes it is argued that the case of *Commonwealth* v. *Ruffner*,† and *Hatwood* v. *The State*,‡ adopt the same rule, but it is clear that neither of those cases supports any such proposition. Instead of that they both decide that it is not necessary to plead the statute of limitations in criminal cases; that the defendant may give it in evidence under the general issue, which undoubtedly is correct, as it affords the prosecutor an opportunity, where the statute contains exceptions, to introduce rebutting evidence and bring the defendant within one of the exceptions.

Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within

* State v. Bryan, 19 Louisiana Annual, 435; United States v. Watkins, 3 Cranch, Circuit Court, 550; People v. Miller, 12 California, 294; McLane v. The State, 4 Georgia, 340.

† 28 Pennsylvania State, 260.

‡ 18 Indiana, 492.

the exception.* Nor is it admitted that any different rule would apply in the case even if the statute of limitations did not contain any exception, as time is not of the essence of the offence; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offence was committed within two years next before the indictment was found and filed.

Examples are given by commentators which serve to illustrate the general doctrine even better than some judicial opinions. No mariner, it was enacted, who was serving on board any privateer employed in certain British colonies, should be liable to be impressed unless it appeared that he had previously deserted from an English ship of war, and the act provided that any officer who should impress such a mariner should be liable to a penalty of fifty dollars. Judgment was arrested in an action brought for the penalty there imposed, because the declaration did not allege that the mariner had not previously deserted, as that circumstance entered into the very description of the offence and constituted a part of the transaction made penal by the statute.†

Labor and travelling on the Lord's day, except from necessity and charity, are forbidden in some States by statute, which also furnishes an example where the exception is a constituent part of the offence, as it is not labor and travelling, merely, which are prohibited, but *unnecessary* labor and travelling, or labor and travelling *not required for charity*.‡

Innkeepers are also prohibited by statute, in some jurisdictions, to entertain on the Lord's day, persons, not lodgers in the inn, if resident in the town where the inn is kept, and an indictment founded on that statute was held to be bad, because it did not aver that the persons entertained

* United States v. White, 5 Cranch, Circuit Court, 60; State v. Howard, 15 Richardson (South Carolina), 282.

† Spieres v. Parker, 1 Term, 141.

‡ State v. Barker, 18 Vermont, 195.

were not lodgers, as it is clear that that circumstance was an ingredient of the offence.*

So an English statute made it penal for any person, not employed in the public mint, to make or mend any instrument used for coining, and it was held that the indictment must negative the want of authority, as that clause was a part of the description of the offence.†

Equally instructive examples are also given by commentators, to show that nothing of the kind is required where the exception is not incorporated with the clause defining the offence, nor connected with it in any manner by words of reference, as in such cases it is not a constituent part of the offence, but is a matter of defence and must be pleaded or given in evidence by the accused.‡

Sufficient has already been remarked to show what answer must be given to the first and second questions, which are both contained in the first interrogatory in the record, and it is only necessary to add in respect to the third, which is numbered second in the transcript, that the only statute of limitations applicable to the offence alleged in the indictment, is the one enacted in the 32d section of the original Crimes Act, which cannot, however, avail the defendant under the demurrer filed to the indictment.

Let the following answers be certified to the Circuit Court:

(1.) That it is not competent for the defendant to take exception by demurrer to the first five counts of the indictment, for the cause assigned.

(2.) That the said five counts, and each of them, do allege and charge upon their face a crime or offence against the

* Commonwealth v. Tuck, 20 Pickering, 361.

† 1 East's Pleas of the Crown, 167; 2 Leading Criminal Cases, 2d edition, 9.

‡ 1 Bishop's Criminal Proceedings, 2 ed., §§ 405, 632, 635, 639; Steel v. Smith, 1 Barnewall & Alderson, 99; State v. Abbey, 29 Vermont, 66; 1 American Criminal Law, 6th ed., §§ 378, 379; 1 Wat. Archbold's Criminal Practice, ed. 1860, 287; Rex v. Pearce, Russell & Ryan, Crown Cases, 174; Rex v. Robinson, Ib. 321; Rex v. Baxter, 2 East's Pleas of the Crown, 781; Same Case, 2 Leach's Crown Cases, 4th ed. 578; 1 Gabbett's Criminal Law, 288.

defendant, for which he is liable in law to be put upon trial, convicted, and punished.

(3.) That the 32d section of the Crimes Act enacts the the only statute of limitation, applicable to the offence charged against the defendant, but that he cannot avail himself of it under the demurrer filed to the indictment.

THE COLLECTOR v. BEGGS.

Under the 20th section of the act of July 20th, 1868, entitled "An act imposing taxes on distilled spirits," &c., in the absence of a distiller's having appealed to the Commissioner of Internal Revenue (as under the 10th section of the act he may do), for the correction of any error made by the assessor in fixing the "true producing capacity" of his distillery, it is lawful for the government to assess and collect, as for a deficiency, the taxes upon the difference between the said "producing capacity" as estimated by the assessor and the amount of spirits actually produced by such distillery, even though the distiller have in good faith reported and paid taxes upon his whole production, and though such production have exceeded 80 per centum of the producing capacity aforesaid.

ERROR to the Circuit Court for the Southern District of Ohio; the case being thus:

The 10th section of the "Act imposing taxes on distilled spirits," &c., approved July 20th, 1868,* enacts:

"That every assessor shall proceed at the expense of the United States, with the aid of some competent and skilful person to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered for the production of spirits in his district, to estimate and determine its true producing capacity, &c., a written report of which shall be made in triplicate, signed by the assessor and the person aiding in making the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the

* 15 Stat. at Large, 129.

Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the assessor to make in like manner another survey of said distillery."

The 19th section of the same act makes it the duty of every distiller, on the 1st, 11th, and 21st days of each month, or within five days thereafter, "to render to the assistant assessor an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse."

The 20th section proceeded thus:

"On receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted, in his returns for the preceding month, for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used in the production of spirits shall be ascertained; and forty-five gallons of mash or beer, brewed or fermented from grain, shall represent not less than one bushel of grain; and seven gallons of mash or beer, brewed or fermented from molasses, shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than 80 per centum of *the producing capacity of the distillery as estimated under the provisions of this act.*"

In September, 1868, soon after the statute took effect, an assessor addressed the Commissioner of Internal Revenue at Washington for instructions on the subject of how the true "producing capacity" of a distillery under section 10 of the above-quoted act was to be determined.

Statement of the case.

The commissioner thus replies to him:

"In determining the true producing capacity of a distillery under the said section, it makes no difference whether the distillery is proposed to be run one, ten, or twenty-four hours, nor what number of bushels the distiller proposes to mash per day.

"You are to determine, first, what number of bushels of grain can be mashed and fermented in twenty-four hours; and second, what quantity of spirits can be produced in twenty-four hours.

"What you are to determine is the absolute producing capacity, without deduction for any cause; you must estimate the maximum quantity of spirits which can be produced by the distiller, supposing him to run continuously for twenty-four hours.

"The number of bushels which you determine upon these principles can be mashed and fermented in twenty-four hours, is the basis upon which you will assess the *per diem* capacity tax imposed by section 13.* The number of bushels so determined, multiplied by the quantity of spirits which can under all circumstances (all the apparatus and machinery being in good order) be produced in the distillery from a bushel of grain, will give the quantity of spirits which can be produced in twenty-four hours; and this is the basis of the examination to be made by you monthly of his return under section 20.

"If his returns exceed 80 per cent. of this, no assessment is necessary, unless it shall appear that his actual production is in excess of his returns."

In this state of things one Beggs, a distiller, made true and correct reports for the months of September, October, and November, 1868, of all the spirits by him *actually* produced. The amount of such spirits, so reported, exceeded 80 per centum of the producing capacity of the distillery of plaintiff for the said months respectively.

He also paid all the taxes assessable against him for such product so reported.

But by a survey of the distillery, which had been made in pursuance of the above-quoted section 10 of the act of July

* This was a tax of $2 per day on every distiller whose distillery had an aggregate capacity for mashing and fermenting twenty bushels of grain or less, or sixty gallons of molasses or less, in twenty-four hours, &c.—REP.

20th, 1868, and in force during the said months of September, October, and November, 1868, the distillery was estimated to be capable of producing from each bushel of grain used three and one-quarter gallons of spirits.

The amounts reported by Beggs as having been produced at his distillery during the said months was less than three and one-quarter gallons for each bushel of grain by him used during that time.

Hereupon the assessor, maintaining that Beggs was bound to pay taxes upon the amount of three and one-quarter gallons for each bushel of grain used by him during those months, assessed him upon the difference between the amount reported in his returns aforesaid and the said estimated product of three and one-quarter gallons per bushel as fixed and determined in the survey; and made return of this assessment to the collector.

On demand made by the collector, Beggs paid under protest the sum assessed, and having made application for repayment of it to the Commissioner of Internal Revenue, who refused to repay it, he brought suit in the court below against the collector, one Stevenson, to recover it.

The court found the facts above stated and held the assessment illegal, and the plaintiff entitled to recover.

Judgment being entered accordingly, the collector brought the case here.

Mr. C. H. Hill, Assistant Attorney-General, for the collector, plaintiff in error:

The judgment below was plainly wrong under the act. The distiller used so much grain; this the case admits. He did not, in fact, get from it all which the assessors had, in fixing the "true producing capacity" of his distillery, fixed as the amount which he could have got. But that cannot now be helped. They fixed (if indeed the distiller did get all that was possible from his distillery) the true producing capacity too high. And he ought at once to have appealed, as the 10th section allowed him to do, to the Commissioner of Internal Revenue. That section provides a complete sys-

tem for measuring the producing capacity of a distillery, and for correcting any errors made in such measurement. Any error which is made by the assessors must be corrected in the manner pointed out, namely, by the appeal. Then a new estimate may be made. But section 20 would seem to place the question beyond a doubt. The 80 per cent. therein required to be assessed is the "80 per centum of the producing capacity of the distillery, *as estimated under the provisions of this act*," namely, under section 10.

The case falls within the principle established in many States, that an action will not lie to recover back a tax imposed on an overvaluation of property where the statutes provide a remedy for the correction of any errors made by assessors in valuing property.*

Messrs. J. D. Cox and H. L. Burnett, contra:

1. The general *object* of the act is stated in the first clause of the 20th section. It is to "determine whether said distiller has accounted in his returns for the preceding month, for all the spirits produced by him." It is therefore not the purpose of the law to treat the distiller unfairly, nor to tax him upon spirits which he does not produce, but only to ascertain his actual production by a reasonably certain rule, and to prevent fraud in his returns.

2. The *basis of calculation* is stated in the next clause, to wit: "To determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained."

In this case, it is part of the case as found, that Beggs's reports were "true and correct."

3. The next clause gives a *means of estimating* the quantity of materials used.

4. We have next the provision, that, if the distiller has returned a less quantity of grain used than this test would show, he shall be assessed for the deficiency, and the assessment shall be collected.

* Ontario Bank v. Bunnell, 10 Wendell, 186; Osborn v. Danvers, 6 Pickering, 98; Howe v. Boston, 7 Cushing, 273.

5. The section ends with the proviso, that "in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than 80 per centum of the producing capacity of the distillery, as estimated under the provisions of this act."

The "producing capacity" is estimated, in the quantity of spirits *per bushel* of grain which the apparatus can make; but in this last clause the gross quantity found by multiplying the product per bushel into the whole number of bushels fermented, is, by a natural substitution, used instead of the circumlocution which would otherwise be necessary.

Taking the several clauses together, it is manifest that no margin or latitude whatever is allowed the distiller as to the *quantity of grain used.* He must report the whole. He cannot even use his discretion in making the mash in his tubs thinner than it will be by using one bushel of grain to every forty-five gallons of the mixture which his vats will contain. He is charged with the use of the quantity of grain which is indicated by this measurement of his vats, and he must use this quantity or bear the loss; for, if he returns less, the assessor must charge him with the deficiency, estimate the gallons of spirits the grain would make, and taxes for that also must be collected from him.

The only latitude allowed is contained in the last clause, known as the eighty per cent. clause. His total product in spirits must not be less than eighty per cent. of what the whole quantity of grain used will make, at the rate per bushel fixed by the official estimate of the "producing capacity" of his apparatus. The twenty per cent. is the maximum allowance to cover the variation in quality of grain, or the accidents or unskilfulness of manufacture.

Mr. Justice STRONG delivered the opinion of the court.

The twentieth section of the act of Congress in question prescribed a mode for the ascertainment of the quantity of spirits for which a distiller was required to account in his monthly returns to the assessor. By a previous section the distiller was required to make a return, but the twentieth

section made it the duty of the assessor, on the receipt of the distiller's first return in each month, to inquire and determine whether he had accounted, in his return for the preceding month, for all the spirits produced by him, and, to determine the quantity of spirits thus to be accounted for, it required that the whole quantity of materials used for the production of spirits should be ascertained. It gave also a rule by which the quantity of materials used for the production of spirits should be ascertained and settled by the assessor, and it then enacted that in case the return of the distiller had been less than the quantity thus ascertained, he should be liable to be assessed for such deficiency, at the rate of fifty cents for every proof gallon, together with the special tax of $1 for every cask of forty proof gallons, which the collector was required to collect. It also enacted that in no case should the quantity of spirits returned by the distiller, together with the quantity so assessed, be less than 80 per centum of the producing capacity of the distillery, as estimated under the provisions of the act.

The next preceding section (the 19th) made it the duty of every distiller, on the 1st, 11th, and 21st days of each month, or within five days thereafter, to render to the assistant assessor an account in duplicate, taken from books he was required to keep, stating not only the number of wine gallons and of proof gallons of spirits produced and placed in warehouse, but also the quantity and kind of materials used for the production of spirits each day.

The purpose of these requisitions, as well as of many others made by the statute, was obviously to guard against fraudulent returns, and to secure to the government a tax upon all spirits produced, and upon all which might have been produced from the quantity of materials used. Hence the distiller was required to return, not merely the amount of his product, but the kind and quantity of materials used by him, and the assessor was directed to test the accuracy of that return, and to estimate, from the quantity of materials ascertained by him to have been used, the number of gallons of spirits which should have been accounted for.

The quantity of materials used, as ascertained by the assessor, was made a measure of production, and upon all spirits ascertained *by that measure* to have been produced, either actually or potentially, the distiller was expressly required, by the twentieth section, to pay the tax, without any reference to his return, or to what had been actually produced. In no case could he escape from liability to pay a tax on at least 80 per centum of what his distillery was estimated to be capable of producing, but if he produced more, or if the quantity of materials which he had used, as ascertained and determined by the assessor, showed that his production had been or should have been greater, he was subjected to the required tax on the quantity of spirits which that ascertained quantity of materials was capable of producing, and not merely upon 80 per centum of that quantity. This was the unequivocal language of the act. Thus the quantity of materials used, *as ascertained by the assessor*, and not the actual product of spirits, was made the measure of liability to taxation and of its extent.

This construction of the 20th section is in entire harmony with all the other parts of the act. The 10th section directed a survey of every distillery registered, or intended to be registered, for the production of spirits, in order to estimate and determine its true producing capacity. This survey was required to be made by the assessor of the collection district, with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue. The mode in which the producing capacity of the distillery was to be ascertained, as prescribed by the regulations of the commissioner, was by measuring each mash, or fermenting tub—by calculating how many bushels of grain, when mashed (if grain was used), the fermenters would hold, by considering the period of fermentation, and deducing therefrom the number of bushels which could be fermented in twenty-four hours. This ascertained, the assessor and his assistant were directed to estimate the quantity of spirits that could be produced in the distillery from a bushel of grain, and multiplying that by the number of bushels that

could be fermented therein in twenty-four hours, the producing capacity of the distillery was to be ascertained and fixed as a standard of taxation, or rather to determine the minimum of taxation. At all events the distiller was made taxable for a production of spirits not less than 80 per cent. of the producing capacity of his distillery, as determined by the survey, whether that quantity was actually produced by him or not; or whether he used a bushel of grain or not. Eighty per cent. of the estimated (not the actual) capacity of the distillery was the smallest amount for which he was made taxable. But if he actually produced more, or if the quantity of grain or other materials used for distillation, as ascertained by the assessor, showed a larger production, he was made taxable to the full extent of that production thus shown. No other interpretation can be given to the 20th section.

Now, applying this to the facts of this case as found by the Circuit Court, it becomes very evident that the judgment should have been given for the defendant below.

It is true the actual production of spirits for the three months, September, October, and November, 1868, as returned by the plaintiff below, and correctly returned, was more than 80 per cent. of the producing capacity of his distillery for those three months. Whether it was more than 80 per cent. of the producing capacity, *as determined by the survey, provided for in the tenth section of the act*, is not found, nor is it material. It is found that by reason of the survey made in pursuance of that section, the distillery was estimated to be capable of producing from each bushel of grain used, three and one-quarter gallons of spirits; that the quantities reported by the plaintiff, as having been produced during those three months, were less than three and one-quarter gallons for each bushel of grain used by him during that time, and that the additional assessment made, of which he complains, was for the difference between the quantity reported in his returns and the estimated product of three and one-quarter gallons for each bushel of grain used, the possible production determined by the survey.

Such being the facts, as found, the plaintiff was expressly declared by the 20th section to be assessable for the difference between his return and the estimated possible product, and it was made the duty of the collector to collect it. The survey and estimate of producing capacity made under the 10th section were conclusive, while they remained, though subject to revision, under the direction of the Commissioner of Internal Revenue. And the extent of liability to taxation was, under the act of Congress, directed to be measured, not by the actual product of spirits, but by what should have been the product of the materials used, according to the estimate made under the 10th section.

It follows that the assessment made was legal, and that the plaintiff is not entitled to recover. The Circuit Court, therefore, erred in giving judgment for the plaintiff.

JUDGMENT REVERSED, and the record remitted with instructions to enter

JUDGMENT FOR THE DEFENDANT.

LAPEYRE v. UNITED STATES.

1. A proclamation of the President relieving parties who had been transacting business in ignorance of it, from penalties, and restoring to them their rights of property, *held*, under special circumstances, by the judgment of the court to have taken effect when it was signed by the President and sealed with the seal of the United States, officially attested.
2. Publication in the newspapers *held*, in the same way, not requisite to make it operative.

APPEAL from the Court of Claims; the case being thus:

By the act of 13th July, 1861,* the President was authorized to proclaim, "that the inhabitants of a State, or any part thereof, where such insurrection exists, are in state of insurrection against the United States;" and thereupon, "all

* 12 Stat. at Large, 257, § 5.

commercial intercourse," between such inhabitants and the citizens of the rest of the United States; "shall cease and be unlawful, *so long as such condition of hostility shall continue.*"

By the act of July 2d, 1864,* provision was made for the transmission and sale of cotton from the insurrectionary States. Among other things it was provided that a person having cotton in the States west of the Mississippi, might transport the same through the lines of the armies of the United States to the city of New Orleans, and there deliver the same to an agent of the United States, who should buy the same and return to the person producing the cotton three-fourths of the market value thereof in the city of New York. In substance this act permitted the introduction and sale of cotton from an enemy's country, subject to a tax of 25 per cent. on the value thereof.

On the 6th of April, 1865, Lee, commanding the body of the rebel forces at Richmond, surrendered. Johnson, with another part of them, surrendered on the 26th of the same month; and Kirby Smith, who commanded west of the Mississippi, did the same on the 26th of May following.

On the 10th of May, 1865, the President issued his proclamation that "armed resistance to the authority of this government may be regarded as virtually at an end."†

On the 18th of June, 1865, one Lapeyre caused to be shipped to New Orleans, from some point west of the Mississippi River, 476 bales of cotton, and consigned the same to the purchasing agent of the government. This cotton reached New Orleans on the 24th day of June. On the 26th the owner executed a bill of sale of the same to the government agent, who returned to him 367 bales, being three-fourths thereof, and retained 119 bales, being one-fourth, under the provisions of the act referred to. At this time neither the claimant nor the agent had any knowledge of the proclamation now to be mentioned.

This proclamation, following one which had been issued on the 13th of June, 1865,‡ removing all restrictions on "in-

* 13 Stat. at Large, 377, § 8. † Ib. 757. ‡ Ib. 763.

ternal domestic and coastwise trade, and upon the removal of products of States heretofore declared in insurrection *east* of the Mississippi River," removed the restrictions upon the trade and intercourse from the States *west* of it,* and restored the former relations between the States. It was an instrument by the President, bearing date June 24th, 1865, in the usual form of a proclamation, and was made by authority of the Congress of the United States. It was headed:

"BY THE PRESIDENT OF THE UNITED STATES:

A PROCLAMATION."

After making various recitals it proceeded:

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, *do hereby declare*," &c.

It closed thus:

"In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the eighty-ninth.

"ANDREW JOHNSON.

"By the President:

"W. HUNTER, Acting Secretary of State."

It was a fact undisputed, and was found by the Court of Claims, in one of its findings—the third—

"That this proclamation of the President, of June 24th, 1865, was not published in the newspapers until the morning of the 27th of the month, nor was it published or promulgated anywhere or in any form prior to said last-named day, unless its being sealed with the seal of the United States in the Department of State was a publication or promulgation thereof."

It was equally undisputed and found that the Secretary of the Treasury sent a telegram to the treasury agent in New

* 13 Stat. at Large, 769.

Orleans, on the 27th June, and also a letter on the 28th June, informing him that the exaction of 25 per cent. on cotton had been rescinded.

The transaction now under consideration had been entered into by both parties ignorant of the removal of the restrictions.

On a suit brought by Lapeyre in the Court of Claims, to recover the proceeds of the 119 bales which had been sold by the United States, the question arose whether this instrument, prior to its being published anywhere, or in form otherwise than as mentioned, had the force and effect of a proclamation. The Court of Claims was of opinion that it had not; and decided against Lapeyre. He now brought the case here for review.

Mr. P. Phillips, for the appellant; a brief of Messrs. H. H. Blackburn, W. H. Lamon, and C. E. Hovey, being filed on the same side:

The prohibition of commercial intercourse provided for by the act of 1861, continued only so long as hostilities existed, and was to end when they ceased. The proclamation of the President declared that they had ended on 10th May, 1865.

The ground for taking from owners of property the one-fourth of its value, was, that the condition of hostilities deprived them of the right to sell it, and the one-fourth was the consideration for the special privilege to do so. As soon as hostilities ceased, the rights of commercial intercourse returned, and there was no longer any consideration upon which the claim of the one-fourth could be rested. The two proclamations were issued but to give full effect to this result of the law of July 2d, 1864. They were a formal notification that the prohibition under that act no longer remained.

The department, charged with the execution of the laws respecting such purchases, has given its construction, and holds that these proclamations operate from their date.

The judgment should in any event be reversed, for the

parties acted under a mistake of fact against which equity will relieve.*

Independently of all this, the present is not a case where a penalty is imposed, and where natural feelings of justice would influence the court to seek escape from inflicting punishment on parties for an act which they believed to be innocent. To the contrary, giving effect to this act from its date restores the party to a right which, in justice, he is entitled to, and which the law of the land intended to confer upon him.

If the matter is placed on technical grounds, the well-known case of *Marbury* v. *Madison*,† may be relied on.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice SWAYNE delivered the judgment of the court.

The only inquiry presented for our consideration is, when the proclamation, which is the hinge of the controversy, took effect. The question arises on the third finding of the Court of Claims, which is as follows: "The proclamation of the President of June 24th, 1865, was not published in the newspapers until the morning of the 27th of that month; nor was it published or promulgated anywhere, or in any form, prior to said last-named day, unless its being sealed with the seal of the United States, in the Department of State, was a publication or promulgation thereof."

There is no act of Congress, and nothing to be found in American jurisprudence, which bears very directly on the subject. In the English law the instrument is thus defined: "Proclamation—*proclamatio*—is a notice publicly given of anything whereof the king thinks fit to advertise his subjects. And so it is used, 7th Richard II, chap. 6."‡

Proclamations for various purposes are mentioned in the English authorities, but it could serve no useful end partic-

* Hunt v. Rousmanier, 8 Wheaton, 174; S. C., 1 Peters, 1.

† 1 Cranch, 137. ‡ Cowel's Law Dictionary.

ularly to refer to them.* In England they must be under the great seal.† If their existence is intended to be denied, the proper plea is *nul tiel record.*‡ It is a part of the king's prerogative to issue them.§ It is a criminal offence to issue them without authority.‖ By the 31st of Henry VIII, chap. 8, it was enacted that the king, with the advice of his council, might issue proclamations denouncing pains and penalties, and that such proclamations should have the force of acts of Parliament. This statute, so fraught with evil to the liberties of the subject, was repealed a few years later in the succeeding reign of Edward VI, and during his minority. A very careful and learned writer says: "A proclamation must be under the great seal, and if denied *is to be tried by the record thereof.* It is of course necessary to be published, in order that the people may be apprised of its existence and may be enabled to perform the injunctions it contains. In the absence of any express authorities it should seem that if the proclamation be under the great seal it need not be made by any particular class of individuals or in any particular manner or place, and that it would suffice if it were made by any one under the king's authority in the market-place or public street of each large town. It always appears in the gazette."¶ This is the only authority on the subject here under consideration which our researches have enabled us to find. The writer refers to no other author and to no adjudicated cases in support of his views. The third section of the Documentary Evidence Act,** declares that the copy of a proclamation purporting to be printed by the queen's printer shall be sufficient proof of the existence of the original. Under the circumstances it may be well to look to the analogy afforded by the promulgation of statutes. At the common law every act of Parliament, unless a different time were fixed, took effect from the first day of the

* 2 Jacobs's Law Dictionary. † 7 Comyns's Digest, 31.
‡ Keyley v. Manning, Cro. Car. 180; Howard v. Slater, 2 Rolls, 172.
§ 1 Blackstone's Commentaries, 70.
‖ Broke's Abridgment, fol. 160; 17 Viner, 199.
¶ Chitty on Prerogatives, 106. ** 8 and 9 Victoria, chap. 113.

session, no matter how long the session or when the act was passed. This rule was applied to acts punishing offences of all grades, including those which were capital and even attaints. The authorities on the subject are learnedly collected by Mr. Justice Story in the case of *The Brig Ann.** Such was the law in England until the passage of the 33d George III, chap. 13, which declared that the royal assent should be indorsed, and that the act should take effect only from that time.

The act of Congress of July 27th, 1789, § 2, declares that whenever a bill, order, resolution, or vote of the Senate and House of Representatives has been signed by the President, or not having been returned by him with his objections, shall have become a law, it shall forthwith thereafter be received by the Secretary of State from the President; and that whenever a bill, order, resolution, or vote—having been returned by the President with his objections—shall have been approved by two-thirds of both houses of Congress, and become a law, it shall be received by the Secretary from the President of the Senate, or Speaker of the House of Representatives, in whichsoever house it shall have been last approved; and it is made his duty carefully to preserve the originals. The first section of the act of April 20th, 1818, directs that the secretary shall publish all acts and resolutions currently as they are passed, in newspapers. The fourth section provides that he shall cause to be published at the close of every session of Congress copies of the acts of Congress at large, including all amendments to the Constitution adopted, and all public treaties ratified, since the last publication of the laws.

Both those acts are silent as to proclamations, and we have been unable to find any provision in the laws of Congress touching the manner of their original promulgation or their subsequent printing and preservation. Numerous acts were passed during the late war authorizing proclamations to be issued, but they are silent upon these subjects.

* 1 Gallison, 64.

In the act of July 10th, 1861, under which the proclamation here in question was issued, the language is—"it may and shall be lawful for the President by proclamation to declare," &c.* In the act of June 22d, 1861, the language is—"the President shall from time to time issue his proclamation."† In the act of December 31st, 1862, the language is the same as in the act first referred to.‡ In the act of March 3d, 1863, the language is—"the President shall issue his proclamation declaring," &c.§ We have nowhere found in the legislation of Congress any material departure from this formula, nor anything further in anywise affecting the question before us.

We know that the established usage is to publish proclamations with the laws and resolutions of Congress currently in the newspapers, and in the same volume with those laws and resolutions at the end of the session.

There is no statute fixing the time when acts of Congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date.‖ Where the language employed is "from and after the passing of this act," the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible. See *Welman's Case*,¶ where the subject is examined with learning and ability.

Publishing by outcry, in the market-place and streets of towns, as suggested by Chitty, has, we apprehend, fallen into disuse in England. It is certainly unknown in this country. While it is said the proclamation always appears in the gazette, he does not say that it cannot become operative until promulgated in that way. As no mode of publication is prescribed, and those suggested will answer, we do not see why applying the seal and depositing the instrument

* 12 Stat. at Large, 257. † Ib. 268. ‡ Ib. 683. § Ib. 735.

‖ Matthews v. Zane, 7 Wheaton, 211.

¶ 20 Vermont, 653; see also Howe's Case, 21 Id. 619; The Ann, 1 Gallison, 62; Arnold v. The United States, 9 Cranch, 104; 1 Kent, 457.

in the office of the Secretary of State, may not be held to have the same effect. The President and Secretary have then completed their work. It is there amidst the archives of the nation. The laws of Congress are placed there. All persons desiring it can have access, and procure authenticated copies of both. The President signs and the Secretary of State seals and attests the proclamation. The President and Congress make the laws. Both are intended to be published in the newspapers and in book form. Acts take effect before they are printed or published. Why should not the same rule apply to proclamations? We see no solid reason for making a distinction. If it be objected that the proclamation may not then be known to many of those to be affected by it, the remark applies with equal force to statutes. The latter taking effect by relation from the beginning of the day of their date, may thus become operative from a period earlier than that of their approval by the President, and indeed earlier than that at which they received the requisite legislative sanction. The legislative action may all occur in the latter part of the day of their approval. The approval must necessarily be still later. It may be added, as to both statutes and proclamations, that even after publication in the newspapers, there are in our country large districts of territory where actual knowledge does not usually penetrate through that or any other channel of communication, until a considerably later period. It will hardly be contended that proclamations should take effect at different times, in different places, according to the speedier or less speedy means of knowledge in such places respectively.

But the gravest objection to the test of publication contended for by the defendant in error remains to be considered. It would make the time of taking effect depend upon extraneous evidence, which might be conflicting, and might not be preserved. The date is an unvarying guide. If that be departed from, the subject may be one of indefinitely recurring litigation. The result in one case would be no bar in another if the parties were different. Upon whom

would rest the burden of proof, the party alleging or the party denying the fact of publication? If, after a lapse of years, the proof were that a proclamation purporting to be published by authority, was seen at a specified time in a newspaper, but the paper were lost and its date could not be shown, would the proclamation be held to take effect only from the time it was so seen by the witness? Suppose in the distant future no proof of publication could be found, would all the rights which had grown up under it be lost unless protected by the rule of limitations? Would the instrument itself be a nullity? Would an exemplified copy from the proper office be an insufficient answer to the plea of *nul tiel record?* According to the views maintained by the counsel for the plaintiff in error all these questions must be answered in the affirmative. The only way to guard against these mischiefs is to apply the same rule of presumption to proclamations that is applied to statutes, that is, that they had a valid existence on the day of their date, and to permit no inquiry upon the subject. Conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty. If the proclamation here involved were a resolution or an act of Congress no such question could arise. That "a proclamation," . . . "if denied, *is to be tried by the record thereof*," and that in such case the proper plea is *nul tiel record*, seems to be conclusive upon the subject.

It would be unfit and unsafe to allow the commencement of the effect whenever the question arises, whether at a near or a distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the instrument itself, as found in the archives of the nation.

JUDGMENT REVERSED, and the case remanded with directions to enter a judgment

IN FAVOR OF THE APPELLANT.

DAVIS, Justice.—I concur in the judgment in this case.

Mr. Justice HUNT (with whom concurred Justices MILLER, FIELD, and BRADLEY), dissenting:

The question presented is this: Does the fact that the document under consideration had on it the seal of the United States, and that it was in the Department of State, give to it the vitality of a proclamation?

If it had vitality or existence on the 24th day of June, the government agent had no authority to retain the 119 bales of cotton by virtue of the law of 1864. If it had not existence on that day, he had authority, and the present claim is without foundation.

What is a proclamation? It is to cry aloud, publicly to make known. One may proclaim, as of old, by the sound of trumpet, or by voice, or by print, or by posting; but not by silence. A proclamation may be published in the newspapers, or scattered by writing, or in any demonstrative manner, but it cannot be published by a deposit in a place to which the public have no access.

The lexicographers agree in their definition of a proclamation. Webster gives it thus: "1. A proclamation by authority; official notice given to the public. 2. In England a declaration of the king's will openly published." "3. The declaration of a supreme magistrate made publicly known." In each of these definitions, it will be perceived that publicity is an important ingredient. "Notice given to the public," "openly published," "made publicly known," are significant expressions. They give it as an essential element of its character that it should be openly and publicly made known. The expounders of the law use nearly the same language as the lexicographers. In Jacobs's Law Dictionary is this language: "Proclamation—a notice publicly given of anything whereof the king thinks fit to advertise his subjects." In Bacon's Abridgment* it is said: "The king, by his prerogative, may in certain cases and on special occasions *make and issue out* proclamations for the prevention of offences, to ratify and confirm an ancient law,

* Prerogative 8.

or, as some books express it, '*quo ad terrorem populi*,' to admonish them that they keep the law on pain of his displeasure." And again:* "The king, by his proclamation, may enforce the execution of the laws, and, therefore, if the king, by proclamation, prohibits that which was before unlawful, the offence afterwards will be aggravated." An unknown and secret act of the king could not legally add to the enormity of a public offence. In his 12th volume,† Coke gives a full statement of what the king may do by proclamation, and what he may not do. Chitty, on Prerogative, thus lays it down: "A proclamation must be under the great seal, and if denied, is to be tried by the record thereof. It is, of course, necessary that it be published, in order that the people may be apprised of its existence and may be enabled to perform the injunctions it contains. In the absence of any express authorities on the point it should seem that if the proclamation be under the great seal, it need not be made by any particular class of individuals or in particular manner and place, and that it would suffice if made by any one under the king's authority, in the market-place or public streets of each large town. It always appears in the gazette."‡ This authority clearly asserts the necessity of publication. It always appears, he says, in the gazette. It would suffice if made in the market-place or public streets.

After a careful examination of the law books—Allen on the Royal Prerogative, Hearne on the Government of England, and several similar works—it is safe to say that no authority can be found contradicting this statement of Chitty.

It is assumed generally, as resting on the nature of the instrument and the general principles of law, that there must be a publication, and nowhere is an intimation to the contrary to be found.

In the case before us no publicity was given to the paper. It was in no gazette, in no market-place, nor in the street.

* Prerogative 8. † Page 76. ‡ Chitty on Prerogative, 106.

It was signed by the President and the Acting Secretary of State, and deposited in the Secretary's office. It does not appear that a single person besides the President and Secretary was aware of its existence. A deposit in the office of state is not notice or publicity. We are not to confound the solemnity or the security of a resting-place in the archives of the state with publicity. No doubt the place of deposit was suitable and appropriate, but if promulgation is founded upon public knowledge or notice, it is difficult to understand how it is furnished by this fact.

Neither did the seal add to its character except to authenticate it. Comyn says that every proclamation ought to be "*sub magno sigillo Anglicæ.*"* As evidence of its regularity and authenticity the seal is well, but it adds nothing to its publicity. It conveys notice to no one. It gives no public knowledge of its existence.

It is argued that a statute takes effect from the date of its approval, unless a different time is fixed by law. As a general rule this is true. It is further said that, by relation, it covers the whole of the day of its approval. This also is generally true. It has often been decided, however, that where justice requires it, the true time of its passage may be shown even to the hour of the day.†

In the case of Welman,‡ cited to sustain the general rule, the qualification here stated is recognized. The statement of Lord Mansfield is given,§ in which it is stated that, when necessary, the law does examine into fractions of a day. He says that "he does not see why the very hour of its passage may not be shown when it is necessary and can be done."

This principle, however, does not aid in the present case. When a bill has passed both houses and been signed by the President, and deposited in the proper place, the legislative and executive power is exhausted. The last act of power has been exercised. The present is more like the case of a

* Title Prerogative; D. E. 8.

† Brainard v. Bushnell, 11 Connecticut, 17; The People v. Clark, 1 California, 408; Gardner v. Collector, 6 Wallace, 499.

‡ 20 Vermont, 653. § Combe v. Pitt, 3 Burrow, 1434.

deed, which takes effect from its delivery. It may be signed, sealed, and acknowledged by the grantor, but, as a general rule, it has no effect while it remains in his possession; nor is the effect different, if it be left in the hands of the notary taking the acknowledgment.

It is said again that a proclamation is a record, and that its existence is to be determined upon the plea of *nul tiel record*. So is a judgment a record. So is a statute; and the same may be said of a deed. The document itself must be proved by the production of the record; but in each of the cases mentioned the time at which it takes effect may be established by parol. In each case its effect is presumptively of the day of its date, but the truth may be shown when the fact is otherwise, and even to fractions of a day when justice requires it.*

It is said also that the introduction of extraneous evidence of the time of publication would cause great confusion. The argument of inconvenience is never a satisfactory one. It is not perceived how it would produce more difficulty in this case than in the case of statutes. A proclamation is usually issued in fact at its date. It is presumed to be so issued. The date may be erroneous. It may have been issued before it bears date. It may have been issued afterwards. The important rights of persons and of property affected by it cannot be allowed to be overborne by the argument of inconvenience. It would produce much greater inconvenience, as well as injustice, to public interests and to private rights that a rule of law or of property should be fixed as of a time which it should be beyond the power of the most vigilant to ascertain. Proclamations by the king alone, or by the king by the authority of Parliament, or by the President by the authority of Congress, or as part of the executive power, embrace an immense range of subjects. Knowledge of their contents, or the means of obtaining it, is of more importance than the inconvenience that may be supposed to arise from leaving the time of publication to be ascertained by actual proof.

* Authorities *supra*.

It is suggested that the case of *Marbury* v. *Madison** is in conflict with the conclusion stated. In that case Mr. Adams had appointed Mr. Marbury and others justices of the peace of the District of Columbia, but their commissions had not been delivered. Afterwards Mr. Madison, Secretary of State, refused to deliver them, and Mr. Marbury applied for a mandamus to compel such delivery. The nominations had been confirmed by the Senate, and the commissions had been signed by the President, and the seal of the United States affixed by the Secretary of State. The court held that when the last act of authority on the part of the Executive had been completed his power was at an end, and the right to the office was perfect. This last act was declared to be the signature of the commission.

The want of applicability of this authority to the case before us is manifest. There the last authority of the President had been exercised. His power was exhausted. Here he had not, on the 24th of June, exercised the last act of authority, nor did he exercise it until the 27th of that month. It is not doubted that when he had exercised it, and had published his proclamation, his power was at an end, the instrument was perfect, and the rights of all parties became fixed. But until he gave life to his proclamation, by some public or official notice of its existence, it was inchoate merely. The last act had not been performed.

The learned counsel who argued for the appellant did not deny that until publication had been made the proclamation was revocable by the President. If the view we take is correct, it certainly remained in his power and under his control for alteration or revocation until publication was made. A revocable law is an anomaly. It is a solecism, an absurdity. If it is a law, it is not revocable. If it is revocable, it is not a law. The elements of change and of certainty cannot exist in the same thing at the same time. Until the 27th of June the proclamation was not beyond the power of change. Until that day, therefore, it could not be a law.

* 1 Cranch, 137.

It has been suggested, although this proclamation did not come into existence until the 27th of June, that after it did take effect, it related back to the 24th of that month. Such a principle is unknown to our laws. It involves the essential effect of a retroactive law. That a man should, on the 24th of June, perform an act lawful and commendable, that by an official declaration on the 27th this lawful act should be rendered unlawful at the time it was performed, and punishable, is in violation of every idea of constitutional law and of common right. When applied to criminal law, such an act is *ex post facto*, and retroactive when applied to civil cases.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or which imposes additional punishment to that then prescribed.*

In *Fletcher* v. *Peck*,† it was decided that an act of the legislature, by which a man's estate shall be seized for a crime, which was not declared to be an offence by some previous law, was null and void.

In *Cummings* v. *Missouri*,‡ it was held that although the prohibition of the Constitution against *ex post facto* laws is aimed against criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal. The passage of an act imposing a penalty upon a priest for the performance of an act, innocent by law at the time it was committed, was, therefore, held to be void.

The principle is so familiar that it is not necessary to accumulate authorities. The proposition we are discussing falls directly within the prohibition.

We are not called upon to decide what would amount to a sufficient publication, or in what manner the required notice may be given. We are simply to decide whether, upon the facts before us, a legal publication of the proclamation had been made on the 24th day of June, 1865.

* Carpenter v. Pennsylvania, 17 Howard, 456.

† 6 Cranch, 87.

‡ 4 Wallace. 277.

ALLEN ET AL. *v.* UNITED STATES.

1. A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use by persons who had illegally procured and sold them, and had afterwards become wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds.
2. It is, therefore, the proper subject of set-off by the United States to a demand made by the general assignees in insolvency of the parties who had thus converted the bonds to their own use, for the price of certain property formerly belonging to the insolvents, and by their said general assignees sold to the United States.
3. The amount of the proceeds of the bonds, though not determined by judicial proceedings, was sufficiently liquidated to be the subject of set-off, since it could be stated with certainty and interest be computed and added.
4. And even if, prior to the passage of the act of March 3d, 1863, amending the act establishing the Court of Claims, objection to the set-off existed in the fact that the demand of the United States was unliquidated (assuming that to have been fact), none could exist subsequent to it; the fifth section of that act covering this class of demands.

APPEAL from the Court of Claims; the case being thus:

A statute of the United States, passed March 3d, 1797,* enacts that,

"When any revenue officer or other persons hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent . . . the debt due to the United States shall be first satisfied, and the priority hereby established shall be deemed to extend to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof . . . as to cases in which an act of legal bankruptcy shall be committed."

And a statute of March 3d, 1863,† amending the act establishing the Court of Claims enacts:

"SECTION 3. That said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or un-

* 1 Stat. at Large, 515. † 12 Id. 765.

liquidated, or other demands whatsoever on the part of the government, against any person making claim against the government in said court; and upon the trial of any such cause, it shall hear and determine such claim or demand both for and against the government and claimant," &c.

These statutes being in force, Russell, Majors & Waddell, partners in business, being at the time wholly insolvent, executed and delivered, in January, 1861, to one Allen and a certain Massey, two deeds of assignment, conveying all their property in trust for the benefit of their creditors. In November following, the claimants sold to the United States a portion of the property thus conveyed, consisting of wagons and oxen, for a sum exceeding $112,000. And the quartermaster of the United States, who acted as agent of the government in the purchase, gave to them certificates that the bills were "correct and just, and that the articles had been accounted for on his property return." Of the sum mentioned, only a part was paid; leaving a balance amounting to $71,491, of which payment was refused.

Thereupon Allen and Massey filed their petition in the Court of Claims, to obtain payment of that balance.

It appeared from the findings of the Court of Claims, that at the date of the assignments, Russell, Majors & Waddell were indebted to the United States in the sum of $870,000 or thereabouts, for certain Indian trust bonds belonging to the United States, which they had illegally procured and sold, and the proceeds of which they had applied to their own use, and it was by reason of this indebtedness that the payment to the claimants of the above mentioned balance was refused.

The Court of Claims held that the United States were entitled to priority of payment out of the proceeds of the property assigned by Russell, Majors & Waddell, under the trust deeds, and to set off so much of the indebtedness of that firm to them, as would be equal to the amount claimed and proved; and accordingly dismissed the petition. Hence the present appeal.

Mr. James Hughes, for the appellants:

1. The findings of the Court of Claims show affirmatively that the claim which was set off against the appellants' vouchers, was an unliquidated and disputed claim which the government had never established, nor prosecuted to judgment, against Russell, Majors & Waddell, the peculiar character of which was such, that it could not be paid and adjusted by the claimants acting as trustees under the assignment.

2. It was competent for the United States to waive thei right of priority of payment under the deeds of assignment, and the purchase of the property and delivery of the formal vouchers sued upon, constitute such waiver.

Mr. G. H. Williams, Attorney-General; Messrs. C. H. Hill, and W. McMichael, Assistant Attorneys-General, contra:

Mr. Justice FIELD delivered the opinion of the court.

Among the cases in which the United States are entitled, by act of March 3d, 1797, to priority in the payment of debts due to them over debts to other creditors, is the case where the debtor, not having sufficient property to pay his debts, makes a voluntary assignment of the property he has for their payment. Of the creditors of Russell, Majors & Waddell, the United States are therefore entitled to be preferred in the payment of their demand out of the proceeds of the property in the hands of the claimants, the property not being subject at the date of the assignments to any specific charge or lien. This preference the claimants cannot disregard in the distribution of the proceeds without making themselves personally liable for the amount payable on the demand of the United States.* If they could recover the amount claimed in the present suit, they would be required immediately to pay it over to the United States on the debt of the assignors, after deducting the expenses of its collection. This is, therefore, a case in which the demand of the

* United States v. Clark, 1 Paine, 629.

United States would be allowed as a set-off against the claim of the assignors, independent of the statute of March 3d, 1863, amending the act establishing the Court of Claims. The demand being for the proceeds of certain Indian trust bonds unlawfully converted by Russell, Majors & Waddell, to their own use, is one arising upon an implied contract, or may be so treated by the waiver of the alleged fraud in the conversion of the bonds. Although the amount of the proceeds has not been determined by judicial proceedings, it can be stated with certainty, and the interest can be added by computation. The demand is therefore the proper subject of set-off in a suit for the recovery by the claimants of the amount due upon a sale to the United States of property held by them under the deeds of assignment.

If the objection urged by counsel of the claimants to the allowance of the set-off, that the demand against Russell, Majors & Waddell is unliquidated, would have been entitled to consideration, supposing such to be the character of the demand, independent of the statute mentioned, it is not entitled to any since the passage of that statute. The third section of the statute is broad enough to authorize the Court of Claims, in suits against the United States, to hear and determine demands of the government of every kind against the claimant, or those whom the claimant represents, whether liquidated or unliquidated, and to set off against the claim in suit the amount found in favor of the United States upon such hearing and determination.

There is nothing in the fact that the quartermaster, who acted as agent of the United States in the purchase of the wagons and oxen from the claimants, gave to them certificates of the correctness of their bills, which constitutes in any respect a waiver on the part of the United States of their right of priority of payment, or even looks in that direction.

DECREE AFFIRMED.

HOLDEN *v.* JOY.

1. The treaty of the 29th December, 1835, between the United States and the Cherokee Indians, was not made in virtue of the act of 28th of May, 1830, authorizing an "exchange" of lands west of the Mississippi, for the territory claimed or occupied by any tribe of Indians within the limits of any State or Territory, but was made under the treaty-making power vested by the Constitution in the President and Senate.
2. The Indian tribes are capable of taking as owners in fee simple lands by purchase where the United States in form, and for a valuable and adequate consideration, so sell them to them.
3. Such sale is properly made by a treaty.
4. The above-mentioned treaty of 29th December, 1835, made such a sale to the Cherokee Indians of the lands west of the Mississippi, known as the "Cherokee Neutral Lands," and the fact and validity of the sale have been recognized by Congress through appropriations made in execution of the treaty making it.
5. The cession to the United States by the Cherokees, in the treaty of June 19th, 1866, of the said Neutral Lands owned by them as aforesaid, in trust that the United States should sell them and hold the proceeds for the benefit of the said Indians, was a lawful cession and trust, and in accordance with the policy and practice of the government.
6. It did not amount to an "abandonment" of the lands; and therefore cannot raise a question whether the lands reverted to the United States in pursuance of a condition inserted in the patent, that the lands should revert to the government, if the Cherokees abandoned them; assuming that such a condition was lawful and of any effect, a matter not conceded.
7. Assuming that either this provision in the patent or the extent to which the Cherokees joined the rebel confederacy in the late rebellion amounted to any abandonment, the United States, the grantors, alone could take advantage of the breach of condition.
8. Their acceptance of the lands in trust, to sell them for the benefit of the Cherokees, condoned the breach of condition if there was one.
9. The supplemental article of April 27th, 1868, to the already-mentioned treaty of June 19th, 1866, was valid; and the sale and patent made to one Joy pursuant to its purpose passed a good title to the said Joy; though the treaty did not convey, *proprio vigore*, the lands meant to be sold, though it required officers of the United States to do certain acts before the sale could be consummated, and though the contract of sale to Joy was signed before the treaty was promulgated.

APPEAL from the Circuit Court for the District of Kansas; the case being thus:

Prior to the year 1817 the Cherokee Indians all resided

on the east of the Mississippi; largely in Georgia. By treaties of the year named, and of 1819,* the tribe was divided into two bodies, one of which remained where they were, east of the Mississippi, and the other settled themselves upon United States land in the country on the Arkansas and White Rivers. The government being desirous to get the entire tribe to the west of the Mississippi River, treaties were made by the United States, May 6th, 1828, and February 14th, 1833,† with this western part of the tribe, by which the United States agreed to "possess" them as well as those of their brethren who still resided in States east of the Mississippi, and to guarantee to them all forever 7,000,000 acres of land west of the Arkansas. But the part of the tribe east of the river did not largely emigrate.

On the 28th of May, 1830, Congress passed an act‡ entitled "An act to provide for an *exchange* of lands with the Indians, residing in any of the States or Territories, and for their removal west of the Mississippi River." The first and second sections of the act authorized the President of the United States to *exchange* certain lands west of the Mississippi River with any tribe or nation of Indians residing within the limits of any of the States or Territories, and with which the United States had existing treaties, for the whole or any portion of the territory claimed or occupied by such Indians. The third section of the act was in these words:

"And be it further enacted, that in the making of any such *exchange or exchanges*, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors, the country so *exchanged* with them, and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same; *Provided always* that such lands shall revert to the United States if the Indians become extinct *or abandon the same.*"

* 7 Stat. at Large, 156, 195. † Ib. 311, 414. ‡ 4 Id. 411.

Statement of the case.

Afterwards, on the 29th of December, 1835, and *while this act was in full force*—the United States, being in possession of a certain 800,000 acres of land west of the Mississippi, known as the "Neutral Lands"* (part of the cession made by France to us April 30th, 1803,† originally occupied by the Osage tribe, but of all their right in which the said tribe had in 1825‡ made a cession to the United States)—the President negotiated a *treaty* with the Cherokees.§

The treaty contains these provisions:

"ARTICLE 1. The Cherokee nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River . . . for and in consideration of the sum of $5,000,000, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles, &c.

"ARTICLE 2. Whereas by the treaty of May 6th, 1828, and the supplemental treaty thereto of February 14th, 1833, with the Cherokees *west of the Mississippi*, the United States guaranteed and secured to be conveyed by patent to the Cherokee nation of Indians the following tract of country [described as in the treaty of 1833, and then quoting the following words from the treaty:] 'which will make 7,000,000 of acres. . . . In addition . . . the United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said 7,000,000 acres, as far west as the sovereignty of the United States and their right of soil extend.' . . . And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of $500,000, therefore, hereby covenant and agree to *convey to the said Indians and their descendants, by patent in fee simple*, the following additional tract of land [described], estimated to contain 800,000 acres of land.

* The name, "Neutral Lands," seems to have been given in consequence of the tract having been originally one interposited between the white inhabitants of Missouri and the more wild and fierce portion of the Osages on the west.

† 8 Stat. at Large, 200. ‡ 7 Id. 240. § Ib. 478.

"ARTICLE 3. The United States also agree that the lands above ceded by the treaty of February 14th, 1833, including the outlet and those ceded by this treaty, shall all be *included in one patent executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the act of May 28th*, 1830."

By an act making appropriations "for carrying into effect certain Indian treaties," approved July 2d, 1836,* Congress appropriated:

"For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees of the 29th of December, 1835, deducting the cost of the land to be procured for them west of the Mississippi River, under the second article of said treaty, $4,500,000."

On the 31st December, 1838, the President, referring to the already mentioned treaties of May 6th, 1828, February 14th, 1833, and December 29th, 1835, and professing to act "in execution of the agreements and stipulations contained in the said several treaties," issued a patent giving and granting the 800,000 acres of land described in the treaty of 1835, "unto the said Cherokee nation," . . . to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, unto the said Cherokee nation forever.

The grant, however, which included a large body of lands not part of the Neutral Lands, or conveyed under the treaty of 1835, was made

"Subject to the condition provided by the act of Congress of 28th May, 1830, and which condition is that the lands hereby granted shall revert to the United States, if the said Cherokees become extinct or *abandon* the same."

On the breaking out of the rebellion the Cherokee Indians generally favored it. Some of them actually joined the rebel army, though a portion of these afterwards deserted and entered the army of the United States.

* 5 Stat. at Large, 73.

Statement of the case.

On the 5th of July, 1862, Congress, by its Indian Appropriation Act of that year, provided:*

"That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith, and legal and national obligations."

This power thus intrusted to the President he did not use, and the treaties with the Cherokee Indians remained in force, notwithstanding the rebellion.

On the 3d of March, 1863,† by the fourth section of the Indian Appropriation Act, the President was authorized to enter into negotiations with various Indian tribes for the purchase of the lands occupied by them in the State of Kansas. The section was thus:

"And be it further enacted, that the President of the United States be, and he is hereby authorized to enter into treaties with the several tribes of Indians respectively, now residing in the State of Kansas, providing for the extinction of their titles to lands held in common, within said State, and for the removal of such Indians of said tribes as hold their lands in common, to suitable localities elsewhere within the territorial limits of the United States, and outside the limits of any State."

After the close of the rebellion, the act of March 3d, 1863, being still in force, the President of the United States entered into negotiations with the Cherokee Indians for that part of their land situate in the State of Kansas. The result of such negotiations was a treaty known as that of July 19th, 1866. This treaty, which is entitled "Articles of *agreement* and convention," is voluminous, and relates to many subjects. Its preamble recites that "existing treaties between the United States and the Cherokee nation are deemed insufficient," and that "the contracting parties *agree* as follows." Article seventeen provides thus:

"The Cherokee nation cedes in trust to the United States

* 12 Stat. at Large, 528. † Ib 793.

the parcel of land in the State of Kansas, which was sold to the Cherokees under provisions of the second article of the treaty of 1835, and also that strip of the land ceded to the nation by the fourth article of said treaty, which is included in the State of Kansas, and the Cherokees consent that said land may be included in the limits and jurisdiction of the said State.

"The lands herein ceded shall be surveyed as the public lands of the United States are surveyed under the direction of the Commissioner of the General Land Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee National Council, and one by the Secretary of the Interior, and in case of disagreement, by a third person to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

"And the Secretary of the Interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidder for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value, provided, that whenever there are improvements of the value of $50 made on the land not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such persons so owning and in person residing on such improvements, shall after due proof made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy at the appraised value the smallest quantity of land in legal subdivisions, which will include his improvements, not exceeding in the aggregate one hundred and sixty acres, the expenses of the sale and improvement to be paid by the Secretary out of the proceeds of sale of said land. [Provided that nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party for cash, for a sum not less than one dollar per acre."]*

* The proviso in brackets was not in the treaty as originally signed, but another, in some respects less extensive, for which the one in brackets was substituted.

The twenty-ninth article of the treaty read thus:

"The sum of $10,000, or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the government to visit Washington for the purpose of making this treaty, shall be paid by the United States on the ratification of this treaty."

By an act passed on the 29th of July, 1866,* this provision was made:

"To enable the Secretary of the Interior to pay the reasonable costs and expenses actually paid or incurred by the delegates of the Southern Cherokees in coming to and going from Washington, and during their stay in and about the negotiation pending the confirmation of treaties with the Indian tribes, a sum not exceeding $10,000. *Provided*, that sum shall be refunded to the treasury *from the proceeds of the sales of the Cherokee Neutral Lands in Kansas.*"

The twelfth article of the treaty, section one, read thus:

"After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe, lawfully resident in said Territory, shall be taken under the direction of the Commissioner of Indian Affairs, who, for that purpose, is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States."

The Indian Appropriation Act of 1866† made this provision:

"For this amount, or so much thereof as may be necessary to enable the Secretary of the Interior to cause a census of each tribe to be taken, under the provisions of the twelfth article of the treaty of July 19th, 1866,—$2500."

The twenty-eighth article of the treaty read thus:

"The United States hereby agree to pay for provisions and clothing furnished the army, under Ap-pothe-le-ha-la-le, in the winter of 1861–62, not to exceed the sum of $10,000 on the ac-

* 14 Stat. at Large, 326. † Ib. 499.

count to be ascertained and settled by the Secretary of the Interior."

The thirtieth article thus:

"The United States agree to pay to the proper claimants, all losses of property by missionaries, or missionary societies, resulting from their being ordered or driven from the country by United States agents, and from their property being taken and occupied or destroyed by United States troops, not exceeding in the aggregate $20,000, to be ascertained by the Secretary of the Interior."

The Indian Appropriation Act of Congress, just mentioned, contains appropriations*

"For provisions and clothing furnished the army under Appothe-le-ha-la-le in the winter of 1861–62, *per twenty-eighth article of the treaty of July 19th*, 1866, $10,000.

"For paying of losses of property by missionaries or missionary societies, &c., *treaty July 19th*, 1866, *thirtieth article*, $20,000."

These and other acts† appropriated in the aggregate $84,825 to carry the treaty into effect.

After this treaty of 1866 was ratified and proclaimed, Mr. Harlan, while Secretary of the Interior, made an agreement with the American Emigrant Company for the sale of the Cherokee Neutral Lands to them. By this agreement Mr. Harlan "agrees to sell, and hereby does sell," to the company, the whole tract of 800,000 acres, known as the "Cherokee Neutral Lands," with the restrictions set forth in the seventeenth article of the treaty of 1866, at $1 per acre, payable in instalments.

"The United States agree to cause said lands to be surveyed as public lands are usually surveyed, in one year from the date hereof, and on the payment of $50,000, to set apart for said company a quantity of said lands, in one body, in as compact form as practicable, extending directly across said tract of land, from east to west, and containing a number of acres equal to the number of dollars then paid, and from time to time to convey the same by patent, to said company or its assigns, when-

* 14 Stat. at Large, 499. † See Ib. 518; 16 Id. 359, 569.

ever afterward requested so to do, in such quantities, by legal subdivisions, as said company shall indicate; and on the payment of each additional instalment, with interest as herein stipulated, to set apart for said company an additional tract of land, in compact form, where said company may request, but extending directly across the said Neutral Lands from east to west, containing a number of acres equal to the number of dollars of principal thus paid, and to convey the same to said company or its assigns, as hereinbefore described; and so on, from time to time, until the whole shall be paid; and no conveyance of any part of said lands shall be made until the same shall be paid for as provided in this agreement, but said company may make payments at earlier periods than those indicated, or pay the whole, principal and interest, and receive titles of tracts of land accordingly, if they shall so elect."

Mr. Browning, the successor in office of Mr. Harlan, disapproved of the sale before it had been consummated, and "agreed," October 9th, 1867, with a certain Joy to sell the same lands to *him*. This matter attracted the attention of Congress. The House of Representatives accordingly, on the 11th of December, 1867, passed a resolution calling on Secretary Browning for information with regard to the sale. The secretary answered the inquiries.

The conclusion of Congress being that the original treaty of 1866 had not made such provisions as would produce for the Indians the greatest amount of money, the Indian commissioners were summoned a second time to Washington. A supplemental treaty was now made (April 27th, 1868), between the United States and the Cherokees. This treaty refers to the sales to the Emigrant Company and to Joy; and recites that for the purpose of harmonizing all interests the company was about to assign their contract to Joy, and agrees that this shall be done and that Joy shall cancel and relinquish his contract made with Mr. Browning.

It then agrees that whenever Joy shall have cancelled and relinquished this contract with Mr. Browning, and shall have accepted the assignment of this contract with the Emigrant Company and entered into a contract with the Secretary of the Interior to assume and perform the obligations

of the company under it, the contract thus assigned, with some modifications as to the time, &c., of payments, shall stand. This treaty was proclaimed June 10th, 1868.

Two days before the ratification, that is to say on the 8th of June, 1868, Mr. Browning and Joy entered into a new contract, reciting Joy's acceptance of the Emigrant Company's obligation (which in terms Joy assumed); reciting further the surrender and cancellation of Joy's old contract, and Mr. Browning, as secretary, agreeing that he would carry out and execute all the provisions of the Emigrant Company's contract, except so far as modified by the supplemental treaty, and "cause patents of said lands to be issued to the said Joy or his assigns in accordance with the terms and provisions thereof."

By the Indian Appropriation Act of July 27th, 1868,* Congress enacted—

"That the sum of $10,356 be appropriated from any money in the treasury not otherwise appropriated, to enable the Secretary of the Interior to defray the expenses of the Cherokee delegation to Washington, District of Columbia, during the year 1867, *Provided that this sum be refunded to the Treasury of the United States out of that portion of the proceeds of the sale of the Cherokee Neutral Lands applicable to Cherokee national purposes.*"

Afterwards, by the Indian Appropriation Act of 1871,† Congress made certain provisos, in the following terms:

"Provided that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; *Provided further*, that nothing herein contained shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

On the 31st of October, 1868—that is to say, after the treaty of 1868 (the supplemental treaty), had been proclaimed, and after the act of July 27th, 1868, had been passed—Joy consummated his purchase of the Cherokee

* 15 Stat. at Large, 228. † 16 Id. 566.

Neutral Lands, and the same were patented to him or his assignee.

At the time when Joy's purchase was thus made, the Indian Intercourse Acts (acts of 1802 and 1834) provided:*

"That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution."

Another law, also, passed January 9th, 1837,† enacted:

§ 1. "That all moneys received from the sale of lands, that have been or *may be hereafter ceded to the United States by Indian tribes by treaties*, providing for the investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded to them respectively, after deducting the expenses of survey and sale, any sum stipulated to be advanced, and the expenses of fulfilling any engagement therein, shall be paid into the treasury of the United States, in the same manner that moneys received from the sale of public lands are paid into the treasury.

§ 2. "That all sums that are or *may* be required to be invested by said treaties are hereby appropriated in conformity with them, and shall be drawn from the treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President."

In this state of facts and of statutory law, one Holden filed a bill in the court below against Joy, setting up that a title had accrued to him to enter a certain quarter-section of a tract of the lands already mentioned, to wit, the Neutral Lands, sold as abovesaid to Joy. The bill alleged that the land claimed was, on the 12th of February, 1867, public land, to which the Indian title had been extinguished; that he, the complainant, having the qualifications of a pre-emptor, on that day settled upon it and took possession of the same; that he had acquired the legal and equitable right to enter the same at the proper land office under the pre-

* See 2 Stat. at Large, 143, § 12; 4 Id. 730, § 12. † 5 Id. 185.

emption laws; that he then made settlement for the purpose of entering it under the said laws, and then took and had ever since had, and now had, open, notorious, adverse, exclusive, and rightful possession of the premises; that at the time he took possession the tribe of Cherokee Indians did not live in the State, and had not since lived there; that no individual Indian of the tribe lived on or near the premises, and that the tract was never settled upon by any person until it was taken possession of by him, the complainant; that he took possession of the land at the time and had continued to occupy it, without any objection from the tribe of Indians or any one of the members of the tribe; that he was the head of a family and a citizen of the United States, &c., &c.

He admitted, however, that there was no public survey of the tract returned and approved until a later period; that no plat or survey of the tract made by authority had ever been returned to the office of the register and receiver, or to the office of the Surveyor-General; that the only record of the survey was in the office of the Commissioner of the General Land Office; and that no instructions had ever been given to the register and receiver respecting the tract by the Secretary of the Interior. But he alleged that he had at all times been and still was ready and willing to make proof before the register and receiver of his settlement and improvement upon the tract, and to pay therefor the price of $1.25 per acre, and that he had tendered such proof and payment, and that the register and receiver had, at all times, refused to take such evidence or to accept pay for the land.

He averred that a right had thus accrued to him to enter the said lands under the pre-emption laws of the United States, and the grievance alleged was that the respondent had commenced an action of ejectment against him for the purpose of ejecting him from the land. He prayed an injunction against the ejectment, and for other relief.

The bill also set forth in considerable fulness what it alleged was the title claimed by the respondent, and averred that there was no other authority of law for the issuing of

the patent of the 31st of October, 1868, to the respondent, under which he claimed the premises in controversy, than the several patents, treaties, and contracts set forth and referred to in the bill of complaint; the same essentially as those mentioned in the preceding statement.

The respondent demurred: (1.) Because the facts set forth in the bill did not constitute a cause of action. (2.) Because they were not sufficient to entitle the complainant to any relief in a court of equity. (3.) Because the bill, if true, showed that the complainant had a complete and adequate remedy in a court of law.

The court below sustained the demurrer, and dismissed the bill, whereupon the complainant appealed to this court.

The case was elaborately argued by *Messrs. William Lawrence, of Ohio, and B. F. Butler, for the complainant*, and by *Messrs. B. R. Curtis and W. P. Hale, contra.*

*For the appellant:**

The treaty of 1835 was made in pursuance of the act of Congress of 1830. It refers to that act specifically in its third section, and proposes to proceed "according to the provisions" of it.† By the treaty, then, the eastern Cherokees "*exchanged*" their lands for a possessory right in common with the western ones, in the 7,000,000 acres, in the "outlet," in "the neutral lands," and in $4,500,000 in money. They acquired no higher title than a possessory right; the sort of right they gave up. They paid no money. The United States received none, but did agree to pay out of the treasury five millions less half a million. There was an exchange of possessory rights; nothing else. In pursuance of that treaty a patent was issued in accordance with the act of 1830, and only *on condition* that the lands should

* The introductory and first five subsequent points were made by Mr. Lawrence, the sixth by Mr. Butler. All were elaborately argued, and with a learned citation of authorities. A copy of Mr. Lawrence's brief (152 pp. 8vo.) is in the Law Library of Congress, chapter 18, No. 2.

† *Supra*, p. 214, top of the page.

"revert to the United States if the said Cherokees should become extinct or *abandon* the lands." Now, on the ratification of the treaty of July 19th, 1866, by which the whole of the lands were given up to the United States, and the Secretary of the Interior authorized to sell them all, where not occupied by actual settlers, the possessory right of the Cherokees was extinguished. On the ratification of the treaty they "abandoned the lands." The lands reverted to the United States and became open to pre-emption.

It will not be denied that Holden's claim is good if the sale to Joy was not good. Was this sale then good, or not so?

We maintain certain legal propositions, any one of which, if true, destroys the title of Joy:

1. *An act of Congress is necessary before the treaty, survey, selection of lands, receipt of payment therefor, or the performance of the treaty trust to sell can be executed.*

That the treaty does not *ex proprio vigore* convey a fee simple legal title to Joy is obvious. It is in form a mere agreement, and should be construed to be no more; for if it is to operate as a law *in form*, even for the purpose of authorizing a sale, or the acts necessary to survey the lands, and select and separate the three classes into which the treaty divides them and receive payment, it operates on a subject the whole of which is intrusted to Congress by the Constitution. Assuming that it will be construed but as an agreement, it cannot be executed without the aid of an act of Congress passed for that purpose. This is settled by the courts.*

2. *Joy has acquired no fee simple or legal title, because there is no authority—by treaty or otherwise—to issue a patent.* A patent issued without authority of law, all will admit is void; and the courts may inquire into conflicting claims resting on questions of law. The treaty of July 19th, 1866, is silent on the subject of a patent or of the mode in which the title held by the United States shall pass. The supplemental treaty professes to ratify a *contract* on file in the Department

* Foster & Elam v. Neilson, 2 Peters, 253; United States v. Arredondo, 6 Peters, 691.

of the Interior. The most that can be claimed for the treaty and the contract is that they gave an inchoate right.

3. *The Cherokee treaty could not constitutionally impose the official duties, or confer the official powers on executive officers necessary to execute it, so as to convey a title to lands.*

These officers are created by acts of Congress for specific purposes and their powers are defined and limited. The treaty power cannot usurp legislative power or interrupt and prevent the performance of duties imposed by the latter power on officers whose offices are established by law. Each power must move in its own orbit. Neither can do that which would retard, impede, burden, or in any manner control the other.

Now, this treaty attempts to confer various powers on, and require duties of, the Secretary of the Interior, the Commissioner of the General Land Office, &c. The performance of these duties are prerequisite to the issuing of a patent. If they were unauthorized, no patent can issue by reason of them. They could have no more effect than if performed by a stranger.

4. *The Cherokee treaty, so far as it stipulates for a disposition of lands, is void, because in conflict with the act of July 22d, 1854, and to the act of June 2d, 1862.*

The former act* provides:

"That all the lands to which the Indian title has been or shall be extinguished, within said Territories of Kansas and Nebraska, shall be subject to the operations of the Pre-emption Act of 4th September, 1841."

The latter,† extending the provision to all lands of the government, enacts in the broadest language, that—

"*All the land belonging to the United States, to which the Indian title has been or shall be extinguished, shall be subject to the operation of the Pre-emption Act of the 4th of September*, 1841; *Provided, however*, that when *unsurveyed lands* are claimed by pre-emption, notice of the specific tracts shall be filed within six months after the survey has been made in the field."

* 10 Stat. at Large, 310, § 12. † 12 Id. 413.

Whether this treaty of 1866 rest on a power given by the Constitution or on one given by acts of Congress, the two acts cited, which dedicated these lands to pre-emption settlement, are superior to it, and in case of a conflict are supreme. The Constitution ordains that—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

These acts, being regulations respecting the territory named, are of necessity "regulations" also of the treaty power.

If it should be conceded that the treaty power—the President and Senate—cannot be regulated in any respect; that they are over and above all law; yet the Commissioner of the General Land Office and the Secretary of the Interior—mere statutory officers—are not beyond the control of law. The acts of 1854 and 1862 operated as a regulation of and restraint on their powers. If so, they could perform no duty in opposition to these acts. For if this is not so, then the treaty power can repeal the laws creating the Interior Department and set up a land office of its own.

5. *An Indian treaty which undertakes to dispose of the public lands without the authority of an act of Congress is unconstitutional and void.*

The Constitution, in substantially the same form in which it delegates express and exclusive powers to the President and to the Supreme Court, delegates to Congress the power, as we have seen, "to dispose of the territory . . . belonging to the United States."

No reason can be given to sustain the treaty power in an attempt to destroy the authority of Congress to dispose of the public lands, which will not equally sustain the treaty power in an effort to annihilate the executive power of pardon, appointments to office, to command the army, &c., and the power of this court to exercise its original jurisdiction.

6. *The treaty was promulgated on the 10th of June, and Mr.*

Secretary Browning signed the contract upon the 8th, that is to say, two days before its promulgation.

Messrs. B. R. Curtis and W. P. Hall, contra:

The treaty of 1835 was not negotiated by force of the act of 1830. That treaty is not one to lay off a district west of the Mississippi, and "exchange" it for a district or lands east of the Mississippi. It is a treaty to purchase the lands of the Cherokees for $5,000,000, and a further agreement to sell the Neutral Lands to the Cherokees, 800,000 acres, for the consideration of $500,000 to be paid therefor. Neither of those objects was within the act of 1830, or authorized thereby. The treaty was made under the treaty-making power, by the President and Senate, and by and under that power alone. That Congress so regarded the treaty is shown by the Appropriation Act of July 2d, 1836,* where Congress ratified and interpreted the treaty, so far as Congress could ratify or interpret a treaty. The act refers both to the article by which the eastern lands were *bought* for $5,000,000, and to the article by which the neutral or western lands were *sold* for $500,000. Both the articles are designated in that act by Congress, and one is treated as a purchase, and the other as a sale. The Indians, indeed, paid no money. They had no occasion to pay any money; they bought the land of their debtor, and they extinguished so much of the debt as the price of the land amounted to.

The United States, as already said, stipulated, by the treaty of 1835, to sell these lands, and make a valid title in fee simple to the Cherokee nation of Indians. Nothing was said in that article of the treaty (and certainly nothing can be implied) concerning any conditions which were to be inserted in the patent. Nevertheless, when the patent was issued, it embraced not merely the Neutral Lands, but other large tracts of lands, which were to be conveyed independent of these Neutral Lands. And it contained two conditions; that the land should revert to the United States provided the nation should become extinct, or the land should

* See *supra*, p. 214.

be abandoned by the nation. Now, the first of these conditions is one which would be silently engrafted on the grant independent of any express words. When there is a grant and the grantee and his heirs become extinct the land escheats to the state, whether the grantee be an individual or a body of individuals. Therefore, we need not quarrel with the first condition. But the other condition—that in regard to the abandonment of the land—is one, which if it were necessary, we could show was wholly unwarranted by the article in the treaty, which stipulated absolutely—not conditionally, but absolutely—to make a title in fee simple. But the matter is unimportant, because there has been no abandonment. A conveyance to a trustee to sell for the benefit of the grantor is not an abandonment.

Whether the President could have issued his proclamation, and declared the treaty with the Cherokees terminated by their having gone over to the rebels, we need not consider. He never issued any proclamation in regard to the treaties in force with the Cherokees. On the contrary, in the year 1866, immediately after the war, this treaty of June 19th was made with the Cherokee nation. And the United States never did insist upon the prior hostility of the Cherokees, nor attempt to insist upon it, for any purpose. Now, if it be a condition lawfully inserted in this patent, that if the Cherokees should abandon the lands, they shall revert to the United States, it is a condition subsequent, and no one but the United States can take advantage of it. If it be a lawful condition, the United States could enter through its officers for the breach of that condition, or the United States might waive the breach, and release the condition itself. And by this treaty they have done both; because they have accepted a cession of those lands from the Cherokees in trust to sell them for the benefit of the Cherokees. After this, manifestly not the United States themselves could take advantage of a breach of this condition, or insist on its existence for any purpose. *A fortiori*, a mere stranger to the title could not do so.

So the title stood when the treaty of 1866 was made. Now

consider how far, and with what effect, Congress has interposed in reference to this treaty of 1866, and the supplemental article of 1868, by which this title was acquired.

We see in the first place, the negotiation of the original treaty; the recognition of that fact by Congress, in making an appropriation for the expenses, and in making other appropriations under the treaty, specifying the articles to carry out what was promised in the treaty by those articles. We find also that in doing this, Congress has expressly provided, that although these moneys are to be thus advanced out of the treasury, they are to be reimbursed from the sales of "neutral lands." What neutral lands? Only these. What sales? Those provided for in the treaty. The principal treaty bore date on the 19th day of July, 1866. The provisions just referred to, for the payment of the expenses of the commissioners and other obligations, applied to expenses accruing in the negotiation of that treaty. But the commissioners had again been summoned to negotiate the supplemental article; they had come here some time in the year 1867, having concluded their labors in April, 1868, and then a provision is made by an act of the 27th of July, 1868, to pay *their* expenses. This last act contains the proviso:

"That this sum be refunded to the treasury of the United States *out of that portion of the proceeds of the sale of the Cherokee Neutral Lands in Kansas, applicable to Cherokee national purposes.*"

The additional article of the treaty was concluded on the 27th of April, 1868. It was proclaimed the 10th of June, 1868. So that, on the 27th of July, 1868, when Congress made this provision for deducting the amount of that appropriation out of the proceeds of the sales of the Cherokee Neutral Lands, it could refer to nothing except this very sale to Joy, which is now under consideration; because, that supplemental article had a provision that a contract should be made by Joy to perform all that the land company had agreed to perform, with some modifications, and that the lands *should be patented to him* under that contract, as fast as they should be paid for.

So far as to the legislative history of this title. We pass now to the pretensions which are set up here on the part of the counsel of the appellant.

The learned counsel rely on several "legal propositions," which they seek to maintain.

It is said in the first and second places, that an act of Congress is necessary before the performance of the treaty trust can be performed; that this treaty does not *ex proprio vigore* convey any title to Joy; that it does not contain any patent to Joy, nor provide for the issue of any to him. But it is not consistent with the nature of the transaction that it should so convey, or contain such a patent. It contains a cession of the land to the United States, and that cession is made to the United States in trust to sell. A sale had been agreed upon between Joy and the Secretary of the Interior, at the time when the supplemental article was negotiated. That sale by the Secretary of the Interior, under the trust, to Joy, is described and ratified and approved of in this supplemental article. Now, to say that this supplemental article does not convey the lands to Joy, is to state what is true but entirely consistent with what the treaty provides for, namely, that the secretary was to convey them to him, by patent, in the name of the United States, in whom the legal title had been vested by the treaty.

It is further insisted, in the third place, that the validity of these proceedings cannot be maintained because the Secretary of the Interior, and the Commissioner of the Land Office, are required to do something; that the treaty is invalid because these public officers are to do something under the treaty. It would be an unusual sort of treaty, under which some public officer was not to do something. If the President and the Senate have the power to make such a treaty as this, and the stipulations in the treaty are what this court must consider them to be—appropriate stipulations—then is it to avoid this treaty that the Secretary of the Interior is to perform certain acts, and the Commissioner of the Land Office certain other acts? Congress, in 1837, legislated generally on this class of subjects, namely, cessions by Indians

in trust.* They speak of them as having been theretofore made; and they show the expectation that they will be thereafter made; they speak of surveys, and the expenses of surveys, of the sales and the expenses of the sales, and provide how they shall be taken out of the proceeds. Certainly, if there were to be surveys and sales, and other expenses, there must be somebody to make surveys, and somebody to make the sales, and somebody to incur the expenses, all of which is plainly contemplated, in this act of Congress, regulating these cessions in trust. And why not the Secretary of the Interior? All these Indian affairs belong to his department. He is the appropriate officer to have the supervision over this subject, and see that the stipulations of this treaty are carried out fairly and effectually on behalf of the contracting parties. Why should he not be selected under the treaty-making power? It is argued that the treaty cannot appoint an officer. That may be true; but if the treaty finds him already appointed and charged with a class of duties, one of which, under the treaty, falls naturally and properly under his office, why, in the name of all that is practicable, should he be not charged with the duty of performing it? The Commissioner of the General Land Office was also to do something. The law of Congress foresaw that the commissioner would be called upon to do something under treaties of this kind, and accordingly an act was passed on the 8th of April, 1864, which requires him to have the necessary surveys made. On the 28th day of July, 1866, another act was passed, making an appropriation for the expenses of these and other similar surveys. This treaty was dated in April, and was promulgated in June. The act contains this provision:

"For surveying Indian and other reservations under treaty stipulations at not exceeding $15 per mile from boundaries, $10 for townships, and $8 per mile for sections; $50,000."

We got the money, then, to make these surveys by the will of Congress, and by the act of the 8th of April, 1864,†

* See *supra*, p. 221.

† 13 Stat. at Large, 41.

already referred to, will be found a law providing that when it should become necessary to survey Indian lands, they shall be surveyed under the Commissioner of Public Lands in the same manner that public lands of the United States are surveyed, which is precisely what they stipulated for in this treaty, viz., that these surveys were to be made under the direction of the commissioner in the manner the surveys of the United States lands are made.

Then in the fourth place it is said, that at the date when the appellant entered upon this land, *the land was public land of the United States, subject to pre-emption.* That is what the opposite counsel undertake to maintain. If they can maintain that, they can succeed. If they cannot maintain that, they must fail. And the inquiry is, whether they can?

The counsel argue that by an act passed on the 22d of July, 1854, there is a provision, which they consider applicable to this case,

"That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Pre-emption Act of the 4th of September, 1841, under the conditions, restrictions, and stipulations therein mentioned."

Now, turning to the Pre-emption Act thus referred to,* we find,

"That from and after the passage of this act, every person, being the head of a family, or widow, &c., &c., having filed his declarations, who since the 1st day of June, 1840, has made, or shall hereafter make a settlement in person, *on the public lands to which the Indian title had been at the time of such settlement extinguished.*"

There are two requirements, and both of them are essential. First, that it should be public lands of the United States; and secondly, that the Indian title should be extinguished.

These were not public lands of the United States. The

* 5 Stat. at Large, 455.

United States had sold them to the Cherokee nation of Indians for a valuable and adequate consideration years before, covenanting that they should have a good title in fee simple, and that title remained in the Indians down to the time when the treaty of 1866 was negotiated. That treaty either took effect or it did not take effect. If it did not take effect, the title remained in the Indians. If the objections which have been taken here were sufficient to show that that entire seventeenth article of the treaty was void, certainly it cannot be both void and valid; valid to transfer the legal title to the United States, and void to declare the sole purpose of the conveyance. If void, the title remained, as already said, in the Indians. If valid, the legal title passed to the United States; *but the title of the Indians was not extinguished within the meaning of this Pre-emption Act.* If a man conveys land to a trustee in trust to sell it, he passes his legal title to such trustee, but he does not *extinguish* his title. He is still the beneficial owner of that land, and continues to be so until the trust has been executed, and the title is passed in conformity to it; and so it must be here.

So far from its being true, that there is anything illegal in the nature of this trust or the manner in which it is declared by an Indian treaty, so long ago as the year 1837, it was so much a recognized part of the policy and practice of this government to accept cessions of Indian lands in trust by a treaty, and to sell them and hold the proceeds for the benefit of the Indians, that the subject is regulated by a general law of Congress; a law passed on the 9th of January, 1837 [see the act quoted *supra*, p. 221]. The act makes a regulation of this general subject, recognizing the fact that such treaties had been theretofore made, and were expected to be thereafter made; and pointing out that after deducting from the proceeds of sales provided and stipulated for by such treaties, the expenses, the balance was to be put into the treasury of the United States in the same manner as the proceeds of sales of public lands.

Indeed, so much was it a matter of course, that such treaties should be made, so much were they expected to be made

frequently, and so just and proper was it considered that they should be made and their stipulations carried into effect, that in the latter clause of the section, as will be seen on reference to it,* there is a general sweeping appropriation covering everything which should be stipulated by such treaties; an instance of legislation for the appropriation of moneys in advance of treaties such as cannot be found anywhere else in the history of this government. So that if there is a distinction to be made between treaties of this character and designed for this purpose, and other treaties, they are placed by this legislation of Congress even higher than any other class of treaties.

Then, it is said, that an Indian treaty cannot vest in an individual a valid title to Indian lands of which the United States had the ultimate fee subject to the usual Indian title of occupancy. Why not? "Because the Constitution says that Congress shall have power to dispose of and make all needful rules and regulations concerning the territory and property of the United States." Granted. But how is Congress to dispose of the property of the United States, including the public lands? Congress can only legislate. Congress can dispose by manifesting its will, and only in that way. Now, Congress *has* manifested its will in regard to the acquisition of titles to Indian lands by Indian treaties. From the beginning of the second year of this government down to the year 1871, when Congress passed an act concerning Indian treaties, to which reference will be made presently, the will of Congress was manifested; and it was manifested to the effect, not only that individuals could acquire titles to Indian lands by Indian treaties, but that they could be acquired by nobody in any other way.

On the 22d day of July, 1790, an act was passed,†

"That no sale of lands made by any Indians, or by any nation or tribe of Indians within the United States, shall be valid to any person, or persons, or to any State, whether having a right to pre-emption of that land or not, *unless* the same shall

* *Supra*, p. 221.

† 1 Stat. at Large, 188, § 4.

be made and duly executed at some public treaty, held under the authority of the United States."

This was a temporary act, which lasted for two years, and until the end of the next Congress. Now, if we follow this down, we shall find in 1793,* an act still more explicit; though this, also, was only a temporary act. The language of the section is peculiar and very significant in reference to the subject we are now considering, and has always been continued in the legislation of Congress since,

"That no purchase or grant of lands, or any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity *unless* the same be made by a *treaty or convention entered into pursuant to the Constitution.*"

Here is the will of Congress; and, by a series of acts, it is its established will; one passed in 1796,† another in 1802,‡ another in June, 1834.§ The last two are permanent laws concerning Indian intercourse.

From the earliest time then, in the history of this government, Congress, using the power which it had to dispose of the public lands, has manifested its will, that by an Indian treaty, and that by an Indian treaty only, title to Indian land could be acquired, either by States or private individuals, and Congress has said—when so manifesting its will—it must be by a treaty such as is provided for under the Constitution, thus showing its construction of what an Indian treaty was. Add to this the general law, already referred to, regulating these trusts of cession, and sales under them, and the disposition of the money, and the court has the whole subject of the acquisition of titles by individuals under Indian treaties so far as it depends on legislation; and in conformity with this legislation are the numerous decisions of this court, *to the effect that titles to Indian lands may be acquired by treaty.* And although by the act of 1871, Congress undertook to, and perhaps did, put an end to the tribal ca-

* 1 Stat. at Large, p. 330, § 8. † Ib. 472. ‡ 2 Id. 143. § 4 Id 730.

pacity of these dependent nations to negotiate further treaties, those already negotiated are expressly saved.

Then, next, it is said that the treaty was promulgated the 10th of June, and that Secretary Browning signed the contract on the 8th of June.

To this the answer is:

(1.) That as respects the rights and duties of each of the contracting parties, the treaty takes effect from its date;* and the act of Secretary Browning was intended to be in the discharge of a duty of the United States under the treaty.

(2.) The supplemental treaty did not require Secretary Browning to enter into any executory contract; it validated the contract of his predecessor, with modifications specified.

(3.) The lands having been patented to Mr. Joy, pursuant to the treaty, it is immaterial whether he held a valid written executory contract for such patents or not. Such a contract would not strengthen his title by patent, nor can the absence of such contract weaken it.

Mr. Joy purchased these lands of the government in good faith, and in accordance with the apparent and the real authority of the agents of the government to sell them. They have been patented to him, he has paid for them, and the purchase-money has been appropriated by Congress. Will this court say he has acquired no title?

Mr. Justice CLIFFORD delivered the opinion of the court.

Concessions made in the bill favorable to the respondent are to be regarded as facts undisputed by the complainant, and matters well pleaded, in favor of the complainant, are, in view of the demurrer, to be considered as facts admitted by the respondent. Viewed in that light, as the pleadings must be, it will be most convenient to inquire, in the first place, whether the title claimed by the respondent is a valid one, as if it is, the decree must be affirmed, and if it is not, the decree must be reversed, and the complainant may perhaps be entitled to relief.

* Haver v. Yaker, 9 Wallace, 32.

Disturbances, and in some instances collisions, of a threatening character, occurred between the Cherokee nation of Indians and certain citizens of the States or Territories in which they resided, in consequence of which the United States and the Cherokee nation became anxious to make some arrangement whereby the difficulties which had arisen by the residence of the Indians within the settled parts of the United States, under the jurisdiction and laws of the States or Territorial governments, might be terminated and adjusted. Measures of various kinds had been devised and tried without effectually accomplishing the object, as will be seen by reference to some of the early treaties with that nation and the acts of Congress upon the subject.*

Treaties of the kind were concluded with that nation of Indians on the 6th of May, 1828, and on the 14th of February, 1833, in both of which the United States agreed to possess the Cherokees of seven million acres of land west of the Mississippi River, bounded as therein described, and to guarantee it to them forever, upon the terms and conditions therein stipulated and agreed. Enough appears in those treaties to show that it was the policy of the United States to induce the Indians of that nation, resident in any of the States or organized Territories of the United States, to surrender their lands and possessions to the United States, and emigrate and settle in the territory provided for them in those treaties. Sufficient is known, as matter of history, to justify the remark, that those measures, as well as some of like kind of an earlier date, were unsuccessful, and that the difficulties continued and became more and more embarrassing.†

Prior measures having failed to accomplish the object of quieting the disturbances or removing the difficulties, the United States, on the 29th of December, 1835, concluded a new treaty with the Cherokee nation, with a view to reunite their people in one body and to secure to them a permanent

* 7 Stat. at Large, 311; Ib. 414.

† The Cherokee Nation v. Georgia, 5 Peters, 15; Worcester v. Georgia, 6 Id. 515.

home for themselves and their posterity in the country selected for that purpose, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits, and condition.*

By the first article of the treaty the Cherokee nation "cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River," and released all their claims for spoliations of every kind, for and in consideration of the sum of $5,000,000, to be expended, paid, and invested in the manner stipulated and agreed upon in other articles of the treaty.

Reference is made in the second article of the treaty to the respective articles of the two before-mentioned treaties, in which the United States agreed to possess the Cherokees of seven million acres of land, situated and bounded as therein described, and guaranteed it to them forever upon the terms and conditions therein stipulated and agreed. Apprehension, it seems, was felt by the Cherokees that the cession contained in those treaties, and confirmed in the new treaty, did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal, and in view of that fact the United States, in consideration of $500,000, covenanted and agreed to convey to the said Indians and their descendants, by patent in fee simple, a certain tract of land, situated and bounded as therein described, estimated to contain eight hundred thousand acres of land, ever afterwards known as the Cherokee neutral lands, and it is admitted in the bill of complaint that it includes the tract in controversy.

Authority was conferred upon the President by the first section of the act of the 28th of May, 1830, to cause so much of any territory belonging to the United States, west of the Mississippi, not included in any State or organized Terri-

* 7 Stat. at Large, 479.

tory, and to which the Indian title had been extinguished, "as he may judge necessary," to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and to remove there, and to cause each of said districts to be so described by natural or artificial boundaries as to be easily distinguished from every other.

Power is also conferred upon the President by the second section of the act to exchange any or all of such districts with any tribe or nation of Indians residing within the limits of any of the States or Territories, for the whole or any portion of the territory, claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, subject to certain conditions therein prescribed. Section three provides that in making such exchanges the President may solemnly assure the tribe or nation that the United States will forever secure and guarantee to them and their heirs and successors the country so exchanged with them, and that, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same, provided that such lands shall revert to the United States if the Indians become extinct or abandon the territory.

Much reason exists to suppose that Congress in framing those provisions had in view the stipulations of the treaty concluded two years earlier, and it is equally probable that the President and Senate in negotiating and concluding the two treaties of later date were largely governed by the several provisions in that act of Congress, but they were not controlled by these enactments, as is evident from the fact that the later of the two contains many stipulations differing widely from the provisions of that act, as for example the United States, in the supplemental article enlarging the quantity of land set apart for the accommodation of the nation, expressly covenant and agree to convey the additional tract to the said Indians and their descendants by patent, in fee-simple title, and the article does not contain any such provision as that contained in the third section of

the act of Congress, that the land shall revert to the United States if the Indians become extinct or abandon the territory.*

Attempt is made in argument to show that the last-named treaty was negotiated by force of the act of Congress to provide for an exchange of lands with the Indians, but it is clear that the proposition cannot be sustained, as the treaty differs widely in many respects from the provisions of that act of Congress. Doubtless the intent and purpose were the same —to quiet the disturbances and to induce the Indians remaining in the States and Territories to emigrate and settle in the district of country set apart for them without the limits of the several States and organized Territories—but the treaty, though concluded to promote the same object as the act of Congress, adopts very different instrumentalities. It is a treaty to confirm to the Indians the possession of the seven million acres of land previously granted to the nation, and to purchase their lands east of the Mississippi River for the sum of $5,000,000, to be expended, paid, and invested in the manner therein stipulated and provided.

Such prior grant of land was made or defined under the two treaties before mentioned to secure a new home for the Indians, without the limits of the several States and Territories, and to induce the Indians still residing within those limits to emigrate and settle in the country long before set apart for that purpose. Large numbers of the Cherokees emigrated and settled there under the treaty of the 8th of July, 1817, and measures of various kinds had been adopted, at later periods, to induce the residue of the nation to follow those who had accepted the proffered protection, but without much success.†

Even treaties proved ineffectual, as one after another failed to accomplish the desired end. They would not emigrate without compensation for their improvements, and many were reluctant to accept any of the terms proposed, upon the ground that the quantity of land set apart for the accom-

* 4 Stat. at Large, 412; 7 Id. 480. † 7 Id. 156.

modation of the whole nation was not sufficient for the purpose. Twice the United States offered the seven million acres of land, with other inducements, but the terms, though formally accepted, did not have the effect to accomplish the end. Experience showed that better terms were required, and the government agreed to purchase their lands for the consideration named in the treaty and to convey to the Indians in fee-simple title, the additional tract of eight hundred thousand acres, for $500,000, to be deducted from the consideration stipulated to be paid for the purchase of their lands.

Other important stipulations are contained in the treaty, among which are the following: (1.) That the United States agree that the lands ceded shall all be included in one patent, executed by the President, to the Cherokee nation, according to the provision of the before-mentioned act of Congress. (2.) That the United States agree to extinguish, for the benefit of the Cherokees, the titles to the reservations within their country, made in the Osage treaty to certain half-breeds, and for that purpose the United States agree to pay to the persons to whom the titles belong the sum of $15,000, according to the schedule accompanying the treaty. (3.) That the United States shall pay the American Board of Commissioners for Foreign Missions for the improvements they have on the ceded country the sums at which the same shall be appraised, and that the money allowed for the improvements shall be expended in schools among the Osages, and for improving their condition. (4.) That the land ceded to the Cherokee nation shall, in no future time, be included, without their consent, within the territorial limits or jurisdiction of any State or Territory. (5.) That the United States agree to protect the Cherokee nation from domestic strifes and foreign enemies and against intestine wars between the several tribes. (6.) That the United States agree to remove the Cherokees to their new homes and to subsist them for one year after their arrival. (7.) That the United States shall liquidate claims for reservations and pay the sums awarded to the claimants; and many other stipula-

tions which were of great value and highly beneficial to the Cherokee nation.

Valid treaties were made by the President and Senate during that period with the Cherokee nation, as appears by the decision of this court in several cases.* Indeed, treaties have been made by the United States with the Indian tribes ever since the Union was formed, of which numerous examples are to be found in the seventh volume of the public statutes.† Indian tribes are States in a certain sense, though not foreign States, or States of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects. They are not States within the meaning of any one of those clauses of the Constitution, and yet in a certain domestic sense, and for certain municipal purposes, they are States, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts.‡

Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided

* United States v. Rogers, 4 Howard, 567.

† Cherokee Nation v. Georgia, 5 Peters, 17; Worcester v. Georgia, 6 Id. 548.

‡ Doe v. Braden, 16 Howard, 635; Fellows v. Blacksmith, 19 Id. 372; Garcia v. Lee, 12 Peters, 519.

two-thirds of the senators present concur, and inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States.*

Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages, and customs. Guided by nautical skill, enterprising navigators were conducted to the New World. They found it, says Marshall, C. J., in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing. Expeditions were fitted out by all the great maritime powers of the Old World, and they visited many parts of the newly discovered continent, and each made claim to such part of the country as they visited. Disputes arose and conflicts were in prospect, which made it necessary to establish some principle which all would acknowledge, and which should decide their respective rights in case of conflicting pretensions. Influenced by these considerations they agreed that discovery should determine the right, that discovery should give title to the government by whose subjects, or by whose authority, it was made, against all other governments, and that the title so acquired might be consummated by possession.† As a necessary consequence the principle estab-

* Holmes v. Jennison et al., 14 Peters, 569; 1 Kent, 166; 2 Story on the Constitution, § 1508; 7 Hamilton's Works, 501; Duer's Jurisprudence, 229.

† Johnson v. McIntosh, 8 Wheaton, 573.

lished gave to the nation making the discovery the sole right of acquiring the soil and of making settlements on it. Obviously this principle regulated the right conceded by discovery among the discoverers, but it could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. Colonies were planted by Great Britain, and the United States, by virtue of the revolution and the treaty of peace, succeeded to the extent therein provided to all the claims of that government, both political and territorial. Throughout, the Indians as tribes or nations, have been considered as distinct, independent communities, retaining their original, natural rights as the undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive pre-emption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.* Evidently,

* Mitchel et al. v. United States, 9 Peters, 748.

therefore, the Cherokees were competent to make the sale to the United States, and to purchase the lands agreed to be conveyed to them by the second article of the treaty. Both parties concede that the title of the United States to the tract known as the Cherokee neutral lands was perfect and complete, and that the tract includes the land in controversy. Title to that tract was acquired by the United States as a part of the Louisiana purchase from the French Republic. By the treaty between the United States and the French Republic of April 30th, 1803, the chief executive officer of that republic ceded the said territory to the United States, with all its rights and appurtenances, forever.* When the President took possession of the Territory the absolute fee-simple title and right of sovereignty and jurisdiction became vested in the United States as the successor of the original discoverer, subject only to the Indian title and right of occupancy as universally acknowledged by all the departments of our government throughout our history. All agree that this land then, and for many years thereafter, was occupied by the Osage Indians. On the 2d of June, 1825, the Osage tribes, by the treaty of that date, ceded to the United States all their right, title, interest, and claims to the lands lying . . . west of the State of Missouri, with such reservations, and for such considerations, as are therein specified, which, it is conceded, extinguished forever the title of the Osage Indians to the neutral lands.†

Prior to the treaty of the 8th of July, 1817, the Cherokees resided east of the river Mississippi. Pursuant to that treaty they were divided into two parties, one electing to remain east of the Mississippi and the other electing to emigrate and settle west of it, and it appears that the latter made choice of the country on the Arkansas and White Rivers, and that they settled there upon the lands of the United States described in the treaty.‡

Possessed as the United States were of the fee-simple title to the neutral lands, discharged of the right of occupancy

* 8 Stat. at Large, 200. † 7 Id. 240. ‡ Ib. 157.

by the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee nation. Subsequent acts of the United States show that the stipulations, covenants, and agreements of the treaty in question were regarded by all the departments of the government as creating binding obligations, as fully appears from the fact that they all concurred in carrying the provisions into full effect.* Appropriations were made for surveys, and surveys were ordered, and plats were made, and on the 1st of December, 1838, a patent for the land promised was issued by the President in full execution of the second and third articles of the treaty. Among other things it is recited in the patent that it is issued in execution of the agreements and stipulations contained in the said several treaties, and that the United States do give and grant unto the Cherokee nation the two described tracts of land as surveyed, containing the whole quantity therein mentioned: to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee nation forever, subject to certain conditions therein specified, of which the last one is that the lands hereby granted shall revert to the United States if the said Cherokee nation becomes extinct or abandons the premises.

Objection is made by the appellant that the treaty was inoperative to convey the neutral lands to the Cherokee nation, which may well be admitted, as none of its provisions purport *proprio vigore*, to make any such conveyance. Nothing of the kind is pretended, but the stipulation of the second article of the treaty is that the United States covenant and agree to convey to the said Indians and their descendants, by patent in fee simple, the described additional tract, meaning the tract known as the neutral lands; and the third article of the treaty stipulates that the lands ceded by the treaty, as well as those ceded by a prior treaty, shall all be included in one patent, to be executed to the Cherokee na-

* Minis v. United States, 15 Peters, 448; Porterfield v. Clark, 2 Howard, 76.

tion of Indians by the President, according to the provisions of the before-mentioned act of Congress.*

Suppose that is so, still it is insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted.† On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.‡ Much reason exists in view of those authorities and others which might be referred to, for holding that the objection of the appellant is not well founded, but it is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid.§ Congress, on the 2d of July, 1836, appropriated $4,500,000 for the amount stipulated to be paid for the lands ceded by the Cherokees in the first article of the treaty, deducting the cost of the land to be conveyed to them west of the Mississippi under the second article of the same treaty, which is the precise amount stipulated to be paid for the concession, deducting the consideration which the Indians agreed to allow for the neutral lands. Appropriations were also made by that act to fulfil and execute the stipulations, covevants, and agreements contained in the

* Gaines v. Nicholson, 9 Howard, 356; Insurance Company v. Canter, 1 Peters, 542.

† United States v. Brooks, 10 Howard, 442; Meigs v. McClung, 9 Cranch, 11.

‡ Wilson v. Wall, 6 Wallace, 89; Insurance Co. v. Canter, 1 Peters, 542; Doe v. Wilson, 23 Howard, 461; Mitchell et al. v. United States, 9 Peters, 749; United States v. Brooks et al., 10 Howard, 460; The Kansas Indians, 5 Wallace, 737; 2 Story on the Constitution, § 1508; Foster et al. v. Neilson, 2 Peters, 254; Crews et al. v. Burcham, 1 Black, 356; Worcester v. Georgia, 6 Peters, 562; Blair v. Pathkiller, 2 Yerger, 407; Harris v. Barnett, 4 Blackford, 369.

§ Insurance Co. v. Canter, 1 Peters, 511; Lawrence's Wheaton, 48.

fourth, eleventh, seventeenth, and eighteenth articles of the treaty, and for the removal of the Cherokees, and for surveying the lands set apart by treaty stipulations for the Cherokee Indians west of the Mississippi River.* Commissioners were appointed to adjudicate the claims of individual Cherokees, as provided in the thirteenth article of the treaty, and their compensation was fixed by Congress, and appropriations were made by Congress for that purpose. Such a board was duly constituted, consisting of two commissioners, and it was made the duty of the Attorney-General, in case of their disagreement, to decide the point in difference.†

Prior treaties between the United States and the Cherokee nation proving to be insufficient to protect and promote their respective interests, the contracting parties, on the 15th of July, 1866, made a new treaty of that date, by the first article of which they declare that the pretended treaty made with the so-called Confederate States by the Cherokee nation, on the 7th of October, 1861, is void, which is all that need be said upon the subject, as both parties repudiate the instrument and concur that it is of no effect.‡ Many new regulations are there adopted and many new stipulations made, but they are all, or nearly all, foreign to the present investigation, except the provision contained in the seventeenth article. By that article the Cherokee nation ceded, in trust, to the United States the tract of land which was sold to the Cherokees by the United States under the provisions of the second article of the prior treaty, and also that strip of the land ceded to the nation by the fourth article of said treaty, which is included in the State where the land is situated, and the Cherokees consent that said lands may be included within the limits and under the jurisdiction of the said State, to be surveyed as the public lands

* 5 Stat at Large, 73.

† 4 Opinions of the Attorneys-General, 580, 598, 613, 615–621; 10 Stat. at Large, 673, 687; 11 Id. 80.

‡ 14 Stat. at Large, 799; Ib 826; Ib. 499.

of the United States are surveyed, under the direction of the Commissioner of the General Land Office, and that the lands shall be appraised as therein provided.

Annexed to that stipulation is a proviso that persons owning improvements and residing on the same, if of the value of $50, and it appears that they were made for agricultural purposes, may, after due proof, be entitled to buy the same at the appraised value, under the conditions therein specified. Sales of the kind may be made under such regulations as the Secretary of the Interior shall prescribe, but another proviso is annexed to the stipulation that nothing in that article shall prevent the Secretary of the Interior from selling for cash the whole of said neutral lands in a body to any responsible party for a sum not less than $800,000.

When the treaty was submitted to the Senate the last proviso was stricken out and another was adopted in its place, as follows: That nothing in the article shall prevent the Secretary of the Interior from selling the whole of said lands, not occupied by actual settlers at the date of the ratification of the treaty (not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States), in a body, to any responsible party, for cash, for a sum not less than one dollar per acre. Exception is there made of improvements made by actual settlers, but the amendment in one respect is more comprehensive than the original treaty, as it extends the authority of the Secretary of the Interior to lands other than those known as the neutral lands, to which the original treaty was confined.

Two objections are made to the title of the appellee as affected by that treaty, in addition to those urged to show that the prior treaty between the same parties was inoperative and invalid. It is contended by the appellant that the Cherokee possessory right to the neutral lands was extinguished by the seventeenth article of the treaty, which undoubtedly is correct, but the conclusion which he attempts to deduce from that fact cannot be sustained, that the Cherokee nation abandoned the lands within the meaning of the

last condition inserted in the patent by which they acquired the same from the United States.

Strong doubts are entertained whether that condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the treaty the United States covenanted and agreed to convey the lands in fee-simple title, and it may well be held that if that condition reduces the estate conveyed to less than a fee, it is void; but it is not necessary to decide that point, as it is clear that if it is valid it is a condition subsequent, which no one but the grantor in this case can set up under any circumstances.*

Even if the rule was otherwise, still the point could not avail the appellant, as the parties manifestly waived it in this case, nor is it true that the sale in trust by the Cherokee nation to their former grantor constitutes such an abandonment of the premises as that contemplated by the condition inserted in the patent.

Unsupported in that proposition, the appellant in the next place contends that the provisions of the seventeenth article of the treaty are a mere agreement, that the article did not operate to convey the lands to the United States; but the court is entirely of a different opinion, as the proposition is contradicted by the practice of the government from its origin to the present time.†

Most of the objections urged against the prior treaty are also urged to show that this treaty is inoperative and invalid, to which the same answer is made as is given by the court in response to the antecedent objections.

Under that article of the treaty a contract was made and executed, dated August 30th, 1866, by the Secretary of the Interior, on behalf of the United States, and by the American Emigrant Company, for the sale of the so-called Cherokee neutral lands, containing eight hundred thousand acres, more or less, with the limitations and restrictions set forth

* 4 Kent, 127–130; Cooper v. Roberts, 18 Howard, 181; Kennett v. Plummer, 28 Missouri, 145.

† Insurance Co. v. Canter, 1 Peters, 542; United States v. Brooks, 10 Howard, 460.

in that article of the treaty as amended, on the terms and conditions therein mentioned, but the successor of the Secretary of the Interior came to the conclusion that the sale, as made by that contract, was illegal and not in conformity with the treaty and the amendments thereto, and on the 9th of October of the succeeding year he entered into a new contract on behalf of the United States with the appellee for the sale of the aforesaid lands, on the terms and conditions in said contract set forth. Embarrassment to all concerned arose from these conflicting contracts, and for the purpose of removing the same all the parties came to the conclusion that it was desirable that the Emigrant Company should assign their contract, and all their right, title, claim, and interest in and to the said neutral lands, to the appellee, and that he should assume and conform to all the obligations of the said company under their said contract. All of the parties having united in that arrangement, the United States and the Cherokee nation, on the 27th of April, 1868, adopted a supplemental article to the last-named treaty, and the same was duly ratified by the Senate and proclaimed by the President.* Acting through commissioners the contracting parties agreed that an amendment of the first contract should be made, and that said contract as modified should "be and the same is hereby, with the consent of all parties, reaffirmed and made valid;" that the second contract shall be relinquished and cancelled by the appellee, and that said first contract, as modified, and the assignment of the same, and the relinquishment of the second contract, "are hereby ratified and confirmed whenever said assignment of the first contract and the relinquishment of the second shall be entered of record in the Department of the Interior, and when" the appellee "shall have accepted said assignment and shall have entered into a contract with the Secretary of the Interior to assume and perform all the obligations of the Emigrant Company under said first-named contract, as therein modified." Important modifications were made in the first

* 15 Stat. at Large, 727.

contract, but it is not important that they should be reproduced at this time.*

After the Indian title was extinguished by the treaty ceding the neutral lands to the United States, and before the supplemental treaty was concluded, many settlers, it is claimed, including the appellant, went on these lands for the purpose of settlement. They took, and have continued, possession for the purpose of complying with and procuring titles under the pre-emption laws passed by Congress, but the local land offices were not open to them, and of course they were denied the opportunity to make proof and payment. Instead of that, patents of the lands, not belonging to actual settlers, were issued to the appellee, and it is admitted by the appellant that the patent of October 31st, 1868, covers the land in controversy, and that he, the appellant, is not entitled to relief if that patent gives to the appellee a valid title.

Precisely the same objections were made to the treaty ceding back the neutral lands to the United States, and to the supplemental treaty, as were taken to the prior treaty under which the United States covenanted to convey the neutral lands to the Cherokee nation, and they must be overruled for the reasons given for overruling the objections to the prior treaty.

Acts of Congress were subsequently passed recognizing the treaty ceding back the lands to the United States, and the supplemental treaty as valid, and making appropriations to carry the same into effect.†

Some other objections of a purely technical character are made by the appellant to the title of the appellee, but these are satisfactorily answered in the printed argument filed in the case by the latter party, and are accordingly overruled.‡

Viewed in any light, the court is of the opinion that the

* 16 Stat. at Large, 728.

† 15 Id. 222; 12 Id. 793; 10 Id. 283; 16 Id. 359; 5 Id. 73.

‡ Attorney-General v. Deerfield Bridge Co., 105 Massachusetts, 9.

title to the land in controversy is in the appellee, and that there is no error in the record.

DECREE AFFIRMED IN EACH CASE.

NOTE.

WARNER v. JOY.

No. 327.

THE decree in this case (like the preceding one, an appeal from the District of Kansas) was also affirmed; Mr. Justice CLIFFORD (who delivered the judgment of the court) observing, that it was clear that such a decree must be given, on an application of the principles adopted and the reasons given in the case just decided; as the pleadings were substantially the same as in it, and there was a stipulation of the parties that the court might take and determine the demurrer filed upon the agreements made in that case and without further argument.

So, too, judgment was here affirmed on a writ of error (No. 328) to the same district, in a suit of ejectment by Joy against Warner for these same lands, where judgment had been given in favor of Joy; Mr. Justice CLIFFORD, who delivered the judgment of the court, saying that the questions presented for decision were "in all respects the same as those presented and decided in *Holden* v. *Joy;*" and that "the court, without hesitation, decides that the title of the plaintiff is complete, and that he is entitled to judgment for the recovery of the possession of the premises in controversy."

TYLER v. MAGWIRE.

The Supreme Court of the State of Missouri, on appeal, dismissed a petition which sought to have the title to lands held by the defendant, under a patent from the United States, divested, and vested in the complainant. From this decree of dismissal a writ of error brought up the case under the twenty-fifth section of the Judiciary Act, the complainant claiming the land under a former patent from the United States.

Statement of the case.

This court determined that the *legal title* to the premises was in the complainant under the second patent, reversed the decree, and remanded the cause "for further proceedings in conformity to the opinion of the court" (8 Wallace, 672). The opinion given, declared also that on the merits (which were gone into, and in which utterance was given as to every point which it was necessary to decide in order to dispose of the case on them), the case was with the plaintiff or complainant

On the presentation of the mandate to the Supreme Court of the State, they directed it to be filed, and entered up an order reversing their former decree, and the cause again coming up to be disposed of, the court decided that the legal title to the premises was vested by the second patent in the complainant, as declared by this court, and that on such a title under the laws and practice of the State there was a plain and adequate remedy at law, and that equity had no jurisdiction of the case made by the petition, and, therefore, decreed dismissing the petition.

To this decree the complainant sued out a second writ of error, under the twenty-fifth section. *Held*—

That the legal sufficiency of the ground maintained by the Supreme Court of the State for its decree, to wit, that by the laws and practice of the State the complainant's remedy on a legal title was at law, and not in equity, is a question within the jurisdiction of this court, and revisable under the twenty-fifth section on a second writ of error.

That whether the legal title was in the complainant, and whether he had an adequate remedy at law, are questions that could only have been properly made in the court of original jurisdiction, or "perhaps before this court on the first writ of error; but it is too late to raise such questions after the whole case had been decided, and the cause remanded for final judgment." That under the Judiciary Act, as well as under that of the 5th February, 1867, amendatory of it, on a second writ of error to a State court, this court "may proceed to a final judgment and award execution."

A decree was, therefore, entered up reversing the decree of the State court, and declaring the title to the lands in controversy to be vested in the complainant, and ordering a writ of possession to be issued by the clerk of this court, directed to the marshal thereof.

APPEAL from the Supreme Court of Missouri; the case being thus:

The constitution of Missouri ordains:

"That the right of trial by jury shall remain inviolate."

The code of the same State enacts:

"There shall be in this State but one *form of action* for the enforcement or protection of private rights, and the redress or

the prevention of private wrongs, which shall be denominated a civil action.*

"Suits may be instituted in courts of record by filing in the office of the clerk of the proper court, a petition setting forth the plaintiff's cause or causes of action, and remedy sought, &c.†

"The first pleading on the part of the plaintiff is the petition, which shall contain: (1.) The title of the cause, specifying the name of the court and county in which the action is brought, and names of parties to the action, plaintiffs and defendants. (2.) A plain, concise statement of the facts constituting a cause of action, without unnecessary repetition. (3.) A demand of the relief to which a plaintiff may suppose himself entitled.‡

"The only pleading on the part of the defendant is either a demurrer or an answer.§

"SECTION 6. The defendant may demur to the petition when it shall appear upon the face thereof, either (1) that the court has no jurisdiction of the person of the defendant, or the *subject of the action;* or (2) that the plaintiff has no legal capacity to sue; or, &c., &c.

"SECTION 10. When any of the matters enumerated in section six (the last quoted section) do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken either by *demurrer or answer*, the defendant shall be deemed to have waived the same, excepting only the objection to the *jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action.*"‖

This provision of the constitution and these provisions of the code being in force, one Magwire, on the 18th of September, 1862, filed his petition in the Court of Common Pleas of St. Louis, Missouri, against Tyler and forty-three other defendants, stating that on the 1st of June, 1794, Joseph Brazeau had a grant of 4 x 20 arpents of land along the bank of the Mississippi River, near the village of St. Louis; that on the 9th of May, 1798, he sold and conveyed 4 x 16 arpents, being the northern part of the tract, to Louis La-

* Revised Statutes of Missouri, 1210. † Ib. 1222.
‡ Ib. 1229. § Ib. 1230. ‖ Ib. 1231.

baume, reserving the 4 x 4 arpents at the southern end for himself; that he, Magwire, the plaintiff, by a chain of conveyances, became the owner of said 4 x 4 arpents; that Labaume, after purchasing the said 4 x 16 arpents, February 15th, 1799, procured an extension of his limits west to the aggregate quantity of 360 arpents, and the same was surveyed to him April 10th, 1799; that this survey was made *contrary to the terms of the grant to Labaume*, and so that, *by mistake or design*, Labaume included in the survey of his enlarged grant the Brazeau tract, which he did not own; that on the 22d of September, 1810, the board of commissioners for the adjustment of land titles in Missouri confirmed to Brazeau his 4 x 4 arpents, and to Labaume his land; that afterwards, and notwithstanding the said 4 x 4 arpents justly and honestly belonged to the plaintiff, the defendants and others, in combination and confederacy, procured a survey to be made under the authority of the United States in such manner as to include the whole Brazeau tract in the claim of Labaume, and procured under like authority a patent to be issued granting the land covered by said survey to the legal representatives of said Labaume; *that the said survey and patent of the Labaume confirmation were issued and procured by said defendants by fraud, covin, and misrepresentation;* that on the 20th of May, 1862, the Brazeau confirmation of 4 x 4 arpents was surveyed inside the exterior limits of the survey and patent of Labaume, and on the 10th of June, 1862, a patent was issued to Brazeau, or his legal representatives, therefor; that each of the defendants claimed an interest in the said Brazeau tract, and was in possession thereof, and had received the rents and profits of the same; that every one of them had notice of the rights of the plaintiff under Brazeau, and that all the defendants had confederated and combined to keep the plaintiff out of possession of the lands claimed, and the rents and profits; that the patent and survey to Labaume's representatives were older than the patent and survey to Brazeau's representatives; that defendants continually assert the validity of the Labaume title and the invalidity of the Brazeau title, and that the said patent and

survey for Labaume's representatives, so procured by fraud, covin, and misrepresentation, conflicted with the patent and survey for Brazeau's representatives, and constituted a cloud upon the plaintiff's title.

"Wherefore,"—thus ran the prayer of the plaintiff's petition—"to the end that *equity* and justice may be meted out to the plaintiff, and that he may be protected in his just rights," the plaintiff prayed:

1. That the court would divest out of the defendants all right, title, and interest acquired *or claimed by them and each of them under Labaume.*

2. And would vest the same in the plaintiff.

3. And would put the plaintiff in possession.

4. And would cause an account to be taken of the rents and profits of the land, and give to the plaintiff judgment therefor.

5. And would give to him "*such other relief as might be proper in the case.*"

The patent to Labaume's representatives granted all the land in its exterior limits, "*saving and reserving any valid adverse right that might exist to any part thereof.*"

The patent to Brazeau's representatives granted all the land included in its exterior limits, "*saving and reserving any valid adverse right which might exist to any part thereof.*"

The defendants answered on the merits of the case to the following effect:

1. That the 4 x 4 arpents confirmed to Brazeau were not properly located by the United States survey thereof inside of Labaume's survey.

2. That the confirmation to Brazeau was void.

3. That the survey for Brazeau's representatives was void for want of legal authority in the officers to make it.

4. That the patent to them was void for the same reason.

5. That the plaintiff, claiming under the confirmation and survey for Brazeau's representatives, was estopped to locate the land inside the Labaume patent, by *matter in pais*, long before their date.

fourth, eleventh, seventeenth, and eighteenth articles of the treaty, and for the removal of the Cherokees, and for surveying the lands set apart by treaty stipulations for the Cherokee Indians west of the Mississippi River.* Commissioners were appointed to adjudicate the claims of individual Cherokees, as provided in the thirteenth article of the treaty, and their compensation was fixed by Congress, and appropriations were made by Congress for that purpose. Such a board was duly constituted, consisting of two commissioners, and it was made the duty of the Attorney-General, in case of their disagreement, to decide the point in difference.†

Prior treaties between the United States and the Cherokee nation proving to be insufficient to protect and promote their respective interests, the contracting parties, on the 15th of July, 1866, made a new treaty of that date, by the first article of which they declare that the pretended treaty made with the so-called Confederate States by the Cherokee nation, on the 7th of October, 1861, is void, which is all that need be said upon the subject, as both parties repudiate the instrument and concur that it is of no effect.‡ Many new regulations are there adopted and many new stipulations made, but they are all, or nearly all, foreign to the present investigation, except the provision contained in the seventeenth article. By that article the Cherokee nation ceded, in trust, to the United States the tract of land which was sold to the Cherokees by the United States under the provisions of the second article of the prior treaty, and also that strip of the land ceded to the nation by the fourth article of said treaty, which is included in the State where the land is situated, and the Cherokees consent that said lands may be included within the limits and under the jurisdiction of the said State, to be surveyed as the public lands

* 5 Stat at Large, 73.

† 4 Opinions of the Attorneys-General, 580, 598, 613, 615–621; 10 Stat. at Large, 673, 687; 11 Id. 80.

‡ 14 Stat. at Large, 799; Ib 826; Ib. 499.

of the United States are surveyed, under the direction of the Commissioner of the General Land Office, and that the lands shall be appraised as therein provided.

Annexed to that stipulation is a proviso that persons owning improvements and residing on the same, if of the value of $50, and it appears that they were made for agricultural purposes, may, after due proof, be entitled to buy the same at the appraised value, under the conditions therein specified. Sales of the kind may be made under such regulations as the Secretary of the Interior shall prescribe, but another proviso is annexed to the stipulation that nothing in that article shall prevent the Secretary of the Interior from selling for cash the whole of said neutral lands in a body to any responsible party for a sum not less than $800,000.

When the treaty was submitted to the Senate the last proviso was stricken out and another was adopted in its place, as follows: That nothing in the article shall prevent the Secretary of the Interior from selling the whole of said lands, not occupied by actual settlers at the date of the ratification of the treaty (not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States), in a body, to any responsible party, for cash, for a sum not less than one dollar per acre. Exception is there made of improvements made by actual settlers, but the amendment in one respect is more comprehensive than the original treaty, as it extends the authority of the Secretary of the Interior to lands other than those known as the neutral lands, to which the original treaty was confined.

Two objections are made to the title of the appellee as affected by that treaty, in addition to those urged to show that the prior treaty between the same parties was inoperative and invalid. It is contended by the appellant that the Cherokee possessory right to the neutral lands was extinguished by the seventeenth article of the treaty, which undoubtedly is correct, but the conclusion which he attempts to deduce from that fact cannot be sustained, that the Cherokee nation abandoned the lands within the meaning of the

last condition inserted in the patent by which they acquired the same from the United States.

Strong doubts are entertained whether that condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the treaty the United States covenanted and agreed to convey the lands in fee-simple title, and it may well be held that if that condition reduces the estate conveyed to less than a fee, it is void; but it is not necessary to decide that point, as it is clear that if it is valid it is a condition subsequent, which no one but the grantor in this case can set up under any circumstances.*

Even if the rule was otherwise, still the point could not avail the appellant, as the parties manifestly waived it in this case, nor is it true that the sale in trust by the Cherokee nation to their former grantor constitutes such an abandonment of the premises as that contemplated by the condition inserted in the patent.

Unsupported in that proposition, the appellant in the next place contends that the provisions of the seventeenth article of the treaty are a mere agreement, that the article did not operate to convey the lands to the United States; but the court is entirely of a different opinion, as the proposition is contradicted by the practice of the government from its origin to the present time.†

Most of the objections urged against the prior treaty are also urged to show that this treaty is inoperative and invalid, to which the same answer is made as is given by the court in response to the antecedent objections.

Under that article of the treaty a contract was made and executed, dated August 30th, 1866, by the Secretary of the Interior, on behalf of the United States, and by the American Emigrant Company, for the sale of the so-called Cherokee neutral lands, containing eight hundred thousand acres, more or less, with the limitations and restrictions set forth

* 4 Kent, 127-130; Cooper v. Roberts, 18 Howard, 181; Kennett v. Plummer, 28 Missouri, 145.

† Insurance Co. v. Canter, 1 Peters, 542; United States v. Brooks, 10 Howard, 460.

in that article of the treaty as amended, on the terms and conditions therein mentioned, but the successor of the Secretary of the Interior came to the conclusion that the sale, as made by that contract, was illegal and not in conformity with the treaty and the amendments thereto, and on the 9th of October of the succeeding year he entered into a new contract on behalf of the United States with the appellee for the sale of the aforesaid lands, on the terms and conditions in said contract set forth. Embarrassment to all concerned arose from these conflicting contracts, and for the purpose of removing the same all the parties came to the conclusion that it was desirable that the Emigrant Company should assign their contract, and all their right, title, claim, and interest in and to the said neutral lands, to the appellee, and that he should assume and conform to all the obligations of the said company under their said contract. All of the parties having united in that arrangement, the United States and the Cherokee nation, on the 27th of April, 1868, adopted a supplemental article to the last-named treaty, and the same was duly ratified by the Senate and proclaimed by the President.* Acting through commissioners the contracting parties agreed that an amendment of the first contract should be made, and that said contract as modified should "be and the same is hereby, with the consent of all parties, reaffirmed and made valid;" that the second contract shall be relinquished and cancelled by the appellee, and that said first contract, as modified, and the assignment of the same, and the relinquishment of the second contract, "are hereby ratified and confirmed whenever said assignment of the first contract and the relinquishment of the second shall be entered of record in the Department of the Interior, and when" the appellee "shall have accepted said assignment and shall have entered into a contract with the Secretary of the Interior to assume and perform all the obligations of the Emigrant Company under said first-named contract, as therein modified." Important modifications were made in the first

* 15 Stat. at Large, 727.

here recited and refers to the opinion of the court delivered at the time the decree was entered as to the ground on which these conclusions rest."

The matter accordingly went back to the Supreme Court of Missouri on this mandate, upon which, as well as on the pleadings and proofs of record in the cause, it came on to be heard. Counsel for the defendant insisted that the Supreme Court of the United States having decided that the legal title was in the plaintiff, his only remedy was at law; that the whole scope and very prayer of the petition filed in the case was for equitable relief, and that the petition should therefore be dismissed.

Counsel of the plaintiff answered, that the code of practice adopted by the State of Missouri would not countenance such an objection; that under it there was no "bill in equity or other formal pleading;" that "justice was now administered without forms;" that the defendants having denied the plaintiff's right and submitted themselves to the judgment of the court, waived the plea of "remedy at law," even supposing the forms of equity pleading still to prevail in Missouri; that as the twenty-fifth section of the Judiciary Act gave the Supreme Court at Washington jurisdiction to pass on the questions involved in the construction of acts of Congress, that court had *implied* authority to pass also upon all incidental questions which were necessary to be determined in order to render a judgment in the case; that the said Supreme Court had done so, as would be seen by the report of the case in 8th Wallace, and that this concluded the Supreme Court of Missouri.

To this it was replied, that the Supreme Court of the United States had no more power to reverse a decision of the Supreme Court of the State on a local question, than the latter court had to reverse a decision of the former court on a Federal one; that while the court at Washington had assumed jurisdiction on a hypothesis that no other than a Federal question had caused the decree in the Supreme Court of Missouri, and could assume it on no other hypothesis, that hypothesis as matter of fact was not true; that

the decree in the said court, which was the mere legal conclusion of the opinion, was based upon several matters of purely local jurisdiction; that the mandate of the Supreme Court of the United States was entitled not to a blind submission, but to an intelligent acquiescence, and that its meaning was to be ascertained by a careful examination of the facts in the case, and the application of whatever opinion had been given to those facts.*

The case having been fully argued before the Supreme Court of Missouri, Mr. Justice WAGNER delivered the unanimous opinion of that tribunal.† Having referred to the decision of the cause by that court here at Washington as reported in 8th Wallace, he said:

"The only question which it was competent for the Supreme Court of the United States to notice when the cause was removed there, was the question of title arising out of the respective confirmations under which the parties claimed. Everything else set up in the bill was peculiarly and exclusively of local State jurisdiction, over which the National tribunal had no control, and concerning which an adjudication here is final.

* * * * * * * * * * *

"In conformity with the decision of the National court the legal title is vested in the plaintiff, and his remedy is the next question to be considered.

"That ejectment is the proper and appropriate remedy, where a party has the title, to recover possession of real estate, is a principle too well established to require argument or the citation of authorities. A bill in equity is not the proper remedy to recover the possession of lands; and where there is an adequate and complete remedy at law, a court of equity will not interpose unless upon some matters coming under some peculiar head of concurrent equity jurisdiction.‡

"In those cases where it is permissible under the code to combine in the same proceeding or petition legal and equitable claim, the matter in equity and the action at law must be separately stated, and must necessarily be separately tried. Each

* Davis v. Packard, 8 Peters, 323; Mitchel v. The United States, 15 Id. 84.

† 47 Missouri, 125; October Term, 1870.

‡ Janney v. Spedden, 38 Missouri, 395.

count must be tried by itself, according to the prescribed mode in such actions and suits. In an action at law there is a constitutional right of trial by jury, which has no existence in equity. The courts in New York have held that an equitable cause of action to remove—as a cloud upon the plaintiff's title—a deed given by mistake by a third party to the defendants, under which, having fraudulently obtained possession by connivance with the plaintiff's tenant, he claims to hold as owner, and a claim to recover the possession of the premises, may be united in the same action and asserted in the same complaint. But it is also clearly held that where legal and equitable causes of action are united under the code, as to the former, on the trial of the causes, the issues must be submitted to a jury.*

"It has often been held in this court that in a bill to set aside a deed as fraudulent, the plaintiff cannot sue for the recovery of the possession of the land, and that proceedings instituted for the purpose of vacating title, vesting it in the plaintiff, and to eject a defendant and obtain possession, are fatally erroneous on writ of error or appeal, and cannot be sustained. When the decree is entered establishing the plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to demand this. He has a right to have a jury pass upon the question of rents and profits, and upon other questions which may arise in that form of action.

"In like manner it has been held that a cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for.†

"It is a grave error—an entirely mistaken notion—to suppose that all distinction between law and equity is abolished by our code of procedure. The line of demarcation—the great and essential principles which underlie the respective systems—is inherent and exists in the very nature of things. Although legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action.

"This principle is almost daily acted upon in our courts, and

* Bradley v. Aldrich, 40 New York, 510; Lattin v. McCarty, 41 Id. 107.

† See Peyton v. Rose, 41 Missouri, 257; Curd v. Lackland, 43 Id. 139; Young v. Coleman, Ib. 179; Gray v. Payne, Ib. 203; Wynn v. Cory, Ib. 301; Jones v. Moore, 42 Id. 413; Lambert v. Blumenthal, 26 Id. 471; Gott v. Powell, 41 Id. 416.

has been the uniform course of practice ever since the adoption of our new system. In all the States where the code has been instituted, the ruling has been harmonious in the same way. The statute enacts that 'there shall be in this State but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a "civil action."'

"In providing that there shall be but one form of civil action, the legislature cannot be supposed to have intended, at one stroke or sweeping enactment, to abolish the well-recognized and long-established distinction between law and equity. Such a construction would lead to perplexities and difficulties, infinite and endless in their character. The innovation extends only to the form of action in the pleadings. While the difference in form and the technicalities in pleadings have been dispensed with, and the party need only state his cause of action in ordinary and concise language, whether it be under assumpsit, trover, trespass, or ejectment, without regard to the ancient forms, still the distinction between these actions has not been destroyed, but remains the same. So cases legal and equitable have not been consolidated, although there is no difference between the form of the bill in chancery and the common-law declaration under our system, where all relief is sought in the same way from the same tribunal. The distinction between law and equity is as naked and as broad as ever. To entitle the plaintiff to an equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law. The judgment vesting him with the legal title shows that he has a complete, appropriate, and ample remedy at law by ejectment. These plain principles were entirely overlooked at the trial in the Court of Common Pleas, but, as before remarked, according to the decision of the majority of the court, the case was instituted and tried upon a misapprehension.

"It results that so much of the motion as asks for an affirmance of the judgment of the Court of Common Pleas will be overruled, and, in accordance with the mandate, the judgment of this court will be reversed, and the petition dismissed."

The decree itself, which as it was relied on here by the counsel of the plaintiff below, as "the crucial test" of ju-

risdiction in this court, it may be best to insert, was in these words:

"1. In conformity to the said mandate the judgment and decree of this court therein mentioned is hereby reversed; and thereupon this cause remains to be proceeded with in conformity to the opinion of the Supreme Court of the United States *and the laws of the State of Missouri.*

"2. This court doth find, and adjudge, and decree, that under and in conformity with the laws of the State of Missouri, the said petition of the said Magwire is a proceeding to obtain equitable relief only in respect to the lands in said petition mentioned, and that no right or title to any equitable relief touching the said lands, or any part thereof, is shown by the said petition and the proofs adduced in support thereof.

"3. The court doth find, adjudge, and decree, that in conformity with the laws of the State of Missouri the legal title to said land cannot be tried and adjudged or determined under said petition, and the proceedings thereunder, there being a plain, adequate, and complete remedy by an action of ejectment in conformity with the laws of the State of Missouri in that behalf, and no relief in the proceedings in equity pending before this court.

"4. The court doth find, adjudge, and decree, that in conformity with the laws of the State of Missouri, the petition of said Magwire is a proceeding for equitable relief only for the purpose of vesting the legal title by decree in said Magwire to the lands therein mentioned. The legal title to which was admitted by plaintiff in his petition to be held by defendants, and the only judgment that, under the laws of the State of Missouri, can be entered therein, if supported by the proofs in the cause, would be a decree vesting the title to said lands in said Magwire; and under said laws the right to recover in that suit the possession of the lands therein described, could not be tried, adjudged, or determined, under the said petition and the proceedings thereunder.

"5. This court doth find, adjudge, and decree, that in conformity with the laws of the State of Missouri, the petition of said Magwire is a proceeding for equitable relief only for the purpose of vesting the legal title to the lands therein described (the legal title to which was admitted by plaintiff in his peti-

tion to be then in defendant), in said plaintiff, Magwire, and in conformity with said laws the right to recover in said suit the rents, issues, and profits of said lands, cannot be tried, adjudged, or determined, under the said petition and the proceedings thereunder.

"6. It is, *therefore*, considered by the court, and the court doth order, adjudge, and decree that the said

PETITION BE DISMISSED WITH COSTS."

From this decree *Tyler* now in turn appealed, and the case was here for the third time; having been already twice before the Common Pleas of Missouri, and twice before the Supreme Court of that State.

The new writ of error, following the language of the twenty-fifth section, recited, that in the proceedings before the State court there "was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or was drawn in question, the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or was drawn in question, the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, especially set up or claimed under said clause of the Constitution, treaty, statute, or commission."

Mr. P. Phillips, with whom was Mr. B. A. Hill, now moved to dismiss the writ for want of jurisdiction:

This writ properly describes the terms of the twenty-fifth section of the Judiciary Act, and in order to maintain the writ, it must be shown, that the decree complained of draws in question the validity of a treaty, statute, or authority, exercised under the United States; or, that it draws in question, the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United

States. If this cannot be shown the writ must necessarily be dismissed. The act of 1789 in conferring this supervisory power carefully defines the cases in which it shall be exercised, and for greater emphasis and to mark the caution with which such a jurisdiction should be exercised, it commands that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and *immediately respects* the before-mentioned questions of validity, or construction of the said Constitution, treaties, statutes, commissions, or authorities, in dispute."

The cases thus defined are brought within the jurisdiction of this court by means of a "writ of error," and the section then declares that this writ "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court."

The "effect" of the writ, relates to its function in removing the cause from the inferior court, and can have no influence upon the question of jurisdiction which had been previously defined.

The section then continues, "the proceeding upon reversal shall also be the same." This refers to the twenty-fourth section, which provides that this court, on reversal, should render such judgment or decree as the court below should have rendered or passed. But this was coupled with the limitation, that it should not issue execution, "but should send a special mandate to the Circuit Court to award execution thereupon."

Having thus provided for the proceeding on reversal, the twenty-fifth section declares, that if the cause has once been remanded before, the court, "instead of remanding the cause for a final decision, may, at their discretion, proceed to a final decision of the same and award execution."

The simple inquiry then is, does the decree of the Supreme Court of Missouri, which is now brought before the court, by this second writ, present any one of the Federal questions designated by the twenty-fifth section? If it does, then this court has jurisdiction. If it does not, then the court is

without the power of revision, however erroneous they may consider the decree. This is the crucial test.

Now, referring to the very words of the decree,* it is plain that all the matters adjudged are relative to State jurisdiction and State practice.

The question adjudicated by this court in Magwire's favor was that he held the *legal title* to the premises in controversy. The State court was directed to proceed in conformity with that decision. There is nothing in the decree which militates in the slightest degree with the adjudication. The jurisdiction under the twenty-fifth section was maintainable only on the ground that the *title* of Magwire to the land was derived from the United States. The court did not and could not have legally passed on the question as to the proper *remedy* for the assertion of the title. The action was begun by Magwire in the State courts, and he must be governed by the remedy which those courts are authorized to administer. If it has been instituted in the Circuit Court of the United States the State remedy would control. From the organization of the Federal judiciary to the present time Congress has regarded the adoption of the forms of proceeding established by the State, in common-law actions, as necessary for the preservation of harmony.

The cases of *Neilson* v. *Lagow*,† and *Carpenter* v. *Williams*,‡ are sufficient to illustrate the limitation affixed to the decision of Federal questions. In the latter case, Mr. Justice Miller says:

"It is a mistake to suppose that every suit for real estate in which the parties claiming under the Federal government are at issue necessarily raises a question of Federal cognizance. If this were so, the title to all the vast domain once vested in the United States could be brought from the State courts to this tribunal."

The only two cases that have come under our observation, in which a second writ of error has been issued to a State

* Quoted *supra*, 266. † 12 Howard, 110. ‡ 9 Wallace, 786.

court, are those of *Martin* v. *Hunter's Lessee*,* and *Davis* v. *Packard*.†

In the former case, the Supreme Court of Virginia, on the receipt of the mandate, instead of obeying the same, entered up a judgment that the twenty-fifth section of the Judiciary Act was unconstitutional, and "that the proceedings in the Supreme Court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court."

The court say:

"This is a final judgment in a suit in a State court denying the validity of a statute of the United States; and unless a distinction can be made between the proceedings under a mandate and proceedings in an original suit, a writ of error is the proper remedy to reverse that judgment. In our opinion no legal distinction exists between the cases."

Here there was no difficulty as to the jurisdiction; the case was plainly within the description of the twenty-fifth section, and if that section was constitutional, as the court decided it to be, there was nothing left but to enter up a judgment reversing the judgment rendered on the mandate.

The other case, *Davis* v. *Packard*, is so substantially like this as to justify a very particular reference. Packard recovered a judgment against Davis in the Supreme Court of New York. Davis appealed to the Court of Errors, where, for the first time by assignment of error there, he brought out the fact that he was a consul of a foreign government. The Court of Errors affirmed the judgment. On writ of error to this court this judgment was reversed and the cause remanded to said court, with "*directions to conform its judgment to the opinion of this court.*" On the receipt of this mandate, the court adjudged, in conformity with the opinion of this court, that "a consul is, by the Constitution and laws of the United States, exempt from being sued in a State court." But they went further, in declaring that it had no

* 1 Wheaton, 304. † 8 Peters, 312.

jurisdiction to reverse a judgment of the Supreme Court of the State for any error of fact, or for any other error than such as appears on the face of the record of that court. That it, therefore, could not notice the assignment made in their court, setting up the official character of the appellant. That the mode of redress for error in fact was by writ of error, *coram vobis*, returnable to said Supreme Court. That the defendant in error was, therefore, entitled to have a judgment of affirmance; "but as, on filing the mandate of the Supreme Court of the United States, he has moved to dismiss the writ of error to the Supreme Court of the State, it is adjudged that the said writ be dismissed and that the plaintiff in error be amerced in costs." From this proceeding a second writ of error was sued out from this court, and the allegation was, as in this case, that the mandate had not been complied with.

In the case now before the court the decision was that Magwire held the legal title. The Supreme Court of the State, in obedience to it, held the same. In the case cited, this court decided that a consul was not suable in a State court, and this was announced as the law by the Court of Errors.

In both cases the form of the mandate is the same, to proceed according to the opinion of the court.

In the case before the court the bill is dismissed, because by the laws of Missouri the remedy was at law, and not in equity. In the case cited, the writ of error to the Supreme Court of the State is dismissed, because there was nothing on the record of that court of which the Court of Errors, by the laws of New York, could take jurisdiction.

This last action was reviewed by this court on the second writ of error.

In both cases the State courts were controlled in their action by the State laws defining their jurisdiction.

Marshall, C. J., says:

"It is not admitted that the court whose judgment has been reversed or affirmed can rejudge that reversal or affirmance; but it must be conceded that the court of dernier resort in

every State *decides upon its own jurisdiction* and *upon the jurisdiction of all inferior courts to which its appellate power extends.* Assuming these propositions *as judicial axioms*, we will inquire whether the judgment of the Court of Errors is in violation of the mandate of this court. Neither the judgment nor mandate of this court prescribed in terms the judgment which should be rendered by the Court of Errors. If the jurisdiction of the court for the correction of errors does not, according to the laws of New York, enable that court to notice errors in fact in the proceedings of the Supreme Court, not apparent on the face of the record, it is difficult to perceive how that court could conform its judgment to that of this court otherwise than by quashing its writ of error to the Supreme Court."

These considerations and authorities demonstrate that this court is without jurisdiction, and that the writ of error should be dismissed.

It will be said, perhaps, that the question of jurisdiction in the State court was not made in the first instance, and could not, therefore, be raised for the first time in the Supreme Court of the State. The answer to this is, that *when* and *how* such a plea to the jurisdiction should be made depends on the practice regulating the courts of the State. It is purely a local question, and when decided by the Supreme Court of the State it is conclusively decided. Such a decision raises no Federal question, and is, therefore, beyond the revisory power of this court.

The counsel of the other side, in bringing the writ here, are in fact asking this court "to affirm the decree of the St. Louis Court of Common Pleas;" the exact thing which this court has once declared, after argument, that it was not right for it to do.

Mr. S. T. Glover, with whom were Messrs. J. M. Carlisle and J. D. McPherson, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Power to re-examine, in a certain class of cases, final judgments and decrees in the highest court of law or equity of a

State, and to reverse or affirm the same upon a writ of error, was conferred upon the Supreme Court by the twenty-fifth section of the Judiciary Act, and the same section provides that the writ of error shall have the same effect as if the judgment or decree had been rendered or passed in the Circuit Court, and that the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, may, at their discretion, if the cause shall have been once before remanded, proceed to a final decision of the same, and award execution.* Where the reversal is in favor of the original plaintiff, and the damages to be assessed or matters to be decreed are uncertain, the Supreme Court will remand the cause for a final decision, unless the same shall have been once before remanded, in which case the court may, at their discretion, proceed to a final decision of the cause. Execution in that event may be awarded here, but the court, in all other appellate cases, will send a special mandate to the subordinate court for all further necessary proceedings.

Such were the directions of the Judiciary Act, but the Congress, on the 5th of February, 1867, amended that section in several particulars, and provided that the writ of error, in such a case, shall have the same effect as if the judgment or decree had been rendered or passed in a Federal court, and that the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same and award execution or remand the same to the inferior court.†

Titles to lands claimed by individuals in Louisiana, at the time the province was ceded to the United States, were, in many cases, incomplete, as the governor of the province never possessed the power to issue a patent. All he could do was to issue to a donee an instrument called a concession or order of survey, and as the claimants had never obtained patents from the supreme government it became necessary for a plaintiff, in a suit to recover the land, to prove that his

* 1 Stat. at Large, 86.

† 14 Id. 387.

claim had been confirmed under some act of Congress. Complete titles, of which there were a few at the date of the cession, required no such confirmation, as they were protected by the third article of the treaty of cession.* It was stipulated by the treaty that the inhabitants of the ceded territory should be admitted into the Union as soon as possible, and that in the meantime they should be maintained and protected in the free enjoyment of their property. Congress accordingly passed the act of the 2d of March, 1805, to ascertain and adjust the titles and claims to land in the ceded territory.† Prior to the passage of that act, however, the province ceded by the treaty had been organized by Congress into two Territories, and the fifth section of the act to ascertain and adjust such titles and claims made provision for the appointment of commissioners in each of those Territories to ascertain and adjudicate the rights of persons presenting such claims. Such commissioners were required by that act to lay their decisions before Congress, but a subsequent act provided that the decision of the commissioners when in favor of the claimant should be final against the United States.‡

Both parties in this case claim under the same concession, which was issued by the governor to Joseph Brazeau. On the 1st of June, 1794, he presented his petition to the governor, asking for a tract of land situate in the western part of the town of St. Louis, beyond the foot of the mound called La Grange de Terre, of four arpents in width, to extend from the bank of the Mississippi in the west quarter, southwest, by about twenty arpents in depth, beginning at the foot of the hill on which stands the mound and ascending in a northwest course to the environs of Rocky Branch, so that the tract shall be bounded on the east side by the bank of the river, and on the other sides in part by the public domain, and in part by the lands reunited to that do-

* 8 Stat. at Large, 202; United States v. Wiggins, 14 Peters, 350.
† 2 Stat. at Large, 326. ‡ Ib. 283, 327, 353, 391, 440.

Restatement of the case in the opinion.

main. Ten days later the governor executed an instrument in which he declared that the tract belonged to the public domain, and certified that he had put the petitioner in possession of the same, specifying in a general way the boundaries of the tract, and describing it as four arpents front by twenty arpents in depth. On the 25th of June, in the same year, the governor issued a concession to the petitioner, in which he formally granted to the donee in fee simple, for him, his heirs or assigns, or whosoever may represent his rights, a tract of land . . . of four arpents front by twenty arpents in depth, situate north of the town; . . . to begin beyond the mound, extending north-northwest to the environs of Rocky Branch; bounded on one side by the bank of the river, and on the opposite by lands reunited to the public domain through which the concession passes, of which one end is to be bounded by the concession to one Esther, a free mulatto woman. Five years before the treaty of cession, on the 9th of May, the donee, by a deed of that date, duly executed before the governor, sold, ceded, relinquished, and transferred to Louis Labeaume, "a concession of land to him given," as aforesaid, consisting of four arpents of land, to be taken from the foot of the hill called La Grange de Terre, by twenty arpents in depth; bounded by the Rocky Branch at the extremity opposite the hillock, east by the river, and west by the land belonging to the royal domain, the said Brazeau reserving to himself four arpents of land to be taken at the foot of the hillock in the southern part of said land, . . . selling only sixteen arpents in depth to said Labeaume, who accepts the sale on those terms and conditions; and the record shows that the instrument was signed by both parties. Four by sixteen arpents were vested in the purchaser by that deed, but he desired to enlarge his possession and he asked the governor to grant him an additional tract of three hundred and sixty arpents, including the tract he acquired by that conveyance, and the governor, on the 15th of February following, made the concession and directed in the same instrument that the surveyor should make out the survey in continuation of his antecedent pur-

chase, and that he should put the interested party in possession of the described premises. Pursuant to those directions the surveyor made the requisite survey, but he included the whole of the former concession in the certificate, overlooking the undisputed fact that the grantor of the deed reserved to himself 4 x 4 arpents of the same, "to be taken at the foot of the hillock in the southern part of said land," which shows the origin of this long-protracted controversy. Special consideration was given to that survey in the first opinion delivered in this case, in which the court decided that such a survey, however the error may have arisen, cannot have the effect to enlarge the rights of the purchaser or to diminish or impair the rights of the donee of the concession, to the 4 x 4 arpents reserved in the said deed, and which were never conveyed to the grantee of the residue of the tract.

Enough has been remarked to show that the premises in controversy are the 4 x 4 arpents reserved in the deed from Joseph Brazeau to Louis Labeaume, and that the plaintiff claims title under the former and that the defendants claim under the latter. Conflicting claims to the premises existing, the plaintiff, on the 18th of September, 1862, commenced the present suit in the land court of the county, but the suit was subsequently transferred by a change of venue to the Court of Common Pleas of the same county, the claim of the plaintiff being for 4 x 4 arpents of land, as described in the petition, and which, as alleged in the petition, was confirmed to the plaintiff by the land commissioners. Full description of the premises as confirmed to the donee is given in the petition, as follows: "Beginning at a point on the right bank of the Mississippi River, the northeast corner of survey No. 3342, in the name of Esther, a free mulatress woman, or her legal representatives, and the southeast corner of Louis Labeaume, survey No. 3333; thence south 74° 30′ west with the southern boundary of the Louis Labeaume survey and the northern boundary of the Esther survey, to the northwest corner of the Esther survey; thence north 23° west 776 feet 8 inches, to a stone; thence 74° 30′ north 776 feet 8 inches, to a point on the right bank of the

Restatement of the case in the opinion.

Mississippi River; thence down and along the right bank of said river, to the beginning corner."

Having described the premises the plaintiff then proceeded to allege that the tract of land so meted and bounded justly and honestly belongs to him as the claimant under the original donee, and charges that the defendants, on the 26th of February, 1852, procured a survey of the same to be made, under the authority of the United States, for the other claimant, which embraces the described tract, and caused the same to be set apart for such other claimant, and that they afterwards, on the 25th of March, 1852, procured a patent to be issued to that same party upon the said survey; that the said 4 x 4 arpents, as reserved in the deed of the original donee, was, on the 8th of May, 1862, again surveyed by the proper authorities and that the same was laid off in the southeast corner of the survey, with its southern boundary coincident with the northern boundary of the Esther tract, and that said survey was duly approved and that a patent was duly issued for the said 4 x 4 arpents of land to the original donee or his legal representatives; that the survey and patent to the other claimant, so far as they conflict with the survey and patent to the original donee, are a cloud upon the title of the plaintiff, as they are older than the latter, and that the defendants continually assert the validity of the former and the invalidity of the latter; that they have combined and confederated to keep the plaintiff out of the possession of the premises, and that they have received the rents and profits thereof to an amount not less than $25,000; and he prays that he may be protected and established in his just rights, and that the court, by its judgment and decree, will divest out of the defendants all the right, title, and interest acquired or claimed by them from the other claimant, or any one claiming under him, and invest the same in the plaintiff and put him in possession thereof, and that an account may be taken of the rents and profits which have accrued while the defendants were in possession of said premises and that the plaintiff may have judgment therefor; and he also prays for such other relief as may be proper in

the case. Service was made and the defendants appeared and filed an answer, denying pretty nearly every material allegation of the petition. They admitted, however, that the governor made the concession of the 4 x 20 arpents to Joseph Brazeau, and they set up as the source of their title the deed of the 4 x 16 arpents, deducting the reservation from the original donee to the other claimant.

Such an instrument granted only an incomplete title, as the governor never possessed the power to issue a patent. Consequently the legal title to the land vested, under the treaty of cession, in the United States, as the successor of the former sovereign, and the court decided, in the prior opinion in this case,* that a donee of an incomplete title, in the territory ceded by the treaty, could not convert such a title, as derived from the former sovereign, into a complete title under the United States in any other mode than that prescribed by an act of Congress. Such being the law it became necessary for the respective parties to prove that their respective claims had been confirmed, and they accordingly introduced in evidence the proceedings in respect to the concession in controversy before the board of commissioners for the adjudication of such claims. Most or all of those documents are material in this investigation, but inasmuch as they will all be found in the former opinion of the court in this case, they will not be reproduced. All of those documents were examined by the court in the prior opinion given in the case, and the court decided that the effect of the proceedings was to correct the error committed by the surveyor of the former government and place the rights of the litigants upon their true basis. Proceedings of various kinds in respect to the tract also took place, under the direction of officers in the land department, subsequent to the treaty of cession, but it will be sufficient to remark upon that subject that the history of those proceedings is fully given in the former opinion, and that the proceedings resulted in the survey and the patent to the original donee

* Magwire v. Tyler, 8 Wallace, 658-661.

or his legal representatives, under which the plaintiff now claims. None of the proceedings are referred to with any other view than to enable the parties to understand the propositions of law and fact which were decided by the court in the former opinion, as it is not proposed to re-examine any of those questions.

Apart from the matters already mentioned the court also decided that the incomplete title to the whole tract of 4 x 20 arpents was granted by the governor to the claimant mentioned in the concession evidencing the grant; that the deed from the donee of the tract to the other claimant did not convey the 4 x 4 arpents now in controversy, but that the title to the same, as acquired by the concession, still remained in the donee of the tract, by virtue of the reservation contained in the deed; that the survey made by the surveyor under the former sovereign did not have the effect to impair the incomplete title of the donee nor to convey, assign, or transfer any interest whatever in the tract of 4 x 4 arpents to the grantee in that deed; that the tract of 4 x 4 arpents was confirmed to the original donee by the decree of the commissioners, of September 22d, 1810, and that the same was never confirmed to the other claimant; that the other claimant did not acquire the legal title to the tract of 4 x 4 arpents under the patent granted to him, as the saving clause in the same reserved any valid adverse right which existed to any part of the tract; that the patent granted to the original donee at the same time never became operative, as he refused to accept the same, and it was returned to the land department; that the subsequent action of the secretary in cancelling the same and in ordering a new survey was authorized by law; that the original donee, by virtue of that survey and the patent granted to him, acquired the legal title to the tract of 4 x 4 arpents, as he was the rightful owner of the incomplete title; that the land reserved is bounded on the south by the concession to the mulatto woman and north by the south line of the "sixteen arpents in depth" conveyed by the deed, and lies north of the ditch; that the legal title to the tract of 4 x 4 arpents remained in

the United States until the 10th of June, 1862, when the patent was granted to the donee of the incomplete title under the former sovereign; that the title of the donee before he obtained the patent was incomplete and attached to no particular parcel of land, and consequently the respective defences of the statute of limitations and of a former recovery were inapplicable to the case, as the legal title was in the United States as derived by the treaty of cession.*

Lastly, the answer set up the defence of innocent purchasers, but the court decided that the record furnished no evidence to support the defence, or to show that the decision of the State court turned upon any such ground, and that the conclusion, in view of those facts, must be, that no such question was decided, as this court will not presume that the court below decided erroneously in order to defeat their own jurisdiction.†

Having overruled all of those special defences the court proceeded to say, in the first opinion, that the incomplete title to the tract remained unextinguished in the original donee or his assigns throughout the whole period of the litigation; that he never sold the 4 x 4 arpents to the other claimant, nor did he ever request that it should be surveyed or located in any other place than the one where it was, by the first survey, ascertained to be; that the other claimant never had any concession of the tract, that he never purchased it and never had any title of any kind to any part of the concession, except the sixteen arpents as described in his deed from the rightful owner of the residue of the tract.

Viewed in the light of these several suggestions, as the case must be, it is plain and undeniable that this court, in the former opinions delivered in the case, disposed of every material question at issue in the record between the parties, and decided "that the said tract of land so meted and

* United States v. King et al, 3 Howard, 786; Same v. Forbes, 15 Peters, 173; Landes v. Brant, 10 Howard, 370; West v. Cochran, 17 Id. 414; Stanford v. Taylor, 18 Id. 412; Bissell v. Penrose, 8 Id. 334.

† Neilson v. Lagow et al, 12 Howard, 110; Magwire v. Tyler et al., 40 Missouri, 483; Magwire v. Tyler et al., 1 Black, 199.

bounded justly and honestly belongs to the plaintiff," as alleged in the petition.

Removed here, as the cause then was, by writ of error to the Supreme Court of the State, it becomes necessary to advert briefly to the proceedings in the State courts.

By the bill of exceptions it appears that the issues of law and fact were heard by the judge of the Court of Common Pleas, trying the cause without a jury, and the bill of exceptions states, at its commencement, that "the following are all the proceedings, evidence, and testimony offered, given, and had before the court." Then follows what purports to be all the proceedings, evidence, and testimony; and the bill of exceptions also states, at its conclusion, that the foregoing is all the evidence, testimony, and proceedings in the cause on the trial thereof before the court, and all, every, and each of said deeds, documents, papers, plats, and depositions, testimony, evidence, records, patents, and all other instruments of writing set forth and copied in the foregoing bill of exceptions, and that the same were duly read in evidence on the trial of this cause, and that the said cause was thereupon submitted to the court for decision and decree. It also appears by the decree that the cause was submitted for decision upon the petition and answers of all the defendants, and the exhibits and other evidence in the cause, and that "the court finds that, out of the claim presented to the board of commissioners by Labeaume, the tract of 4 x 4 arpents claimed by the plaintiffs was confirmed to Joseph Brazeau, or his legal representatives; and that the court also found the issues in this cause in favor of the plaintiff, and therefore it was ordered, adjudged, and decreed that the tract of land, meted and bounded as follows," describing it as before stated, "be and the same is hereby decreed to the plaintiff, and that all the right, title, and interest of each and every one of said defendants in and to said tract of land, is hereby divested out of them and vested in and passed to the plaintiff, to have and to hold to the plaintiff, his heirs and assigns, the said tract of land so passed to the plaintiff, his heirs and assigns forever, the same being the tract covered by the

survey No. 3343, approved May 8th, 1862, and patented to Joseph Brazeau or his legal representative, the 10th of June in the same year." Rents and profits were also decreed to the plaintiff, and the cause was sent to a master to report the amount. Two motions for new trial were filed by the defendants, but they were both denied, and the court having amended and confirmed the report of the master, entered a final decree for the plaintiff, and the defendants having filed a bill of exceptions, as before explained, appealed to the Supreme Court of the State. Hearing was had in the Supreme Court upon the exhibits, proofs, evidence, and testimony set forth in the bills of exceptions, and the Supreme Court reversed the decree of the Court of Common Pleas and dismissed the petition. Whereupon the plaintiff sued out a writ of error and removed the cause into this court, and this court reversed the decree of the Supreme Court of the State, and by the order, as amended, remanded the cause for further proceedings in conformity to the opinion of the court.* Pursuant to the mandate of this court remanding the cause, the Supreme Court of the State reversed their former decree reversing the judgment and decree of the Court of Common Pleas and dismissing the petition, but they did not proceed and dispose of the case in conformity to the opinion of this court, as directed in the mandate.

By the directions of the mandate they were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, which in effect evades the directions given by this court, and practically reverses the judgment and decree which the mandate directed them to execute. Argument to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed, and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate

* Magwire v. Tyler, 8 Wallace, 672.

as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.

Beyond all question this court decided every question at issue between the parties which it was necessary to decide to dispose of the case upon the merits, and it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree. Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, except in cases of fraud, as there is no act of Congress which confers any such authority. Second appeals or writs of error are allowed, but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud. Appellate power is exercised over the proceedings of subordinate courts, and not over the judgments or decrees of the appellate court, and the express decision of this court in several cases is that "the court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law," which is all that need be said upon the subject.* On receipt of the mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings.†

Deprived of the fruits of the decree of this court, as ordered in the mandate, the plaintiff sued out a second writ

* Washington Bridge Co. v. Stewart et al., 3 Howard, 424; Ex parte Sibbald, 12 Peters, 492; Peck v. Sanderson, 18 Howard, 42; Leese v. Clark, 20 California, 417; Hudson v. Guestier, 7 Cranch, 1; Browder v. McArthur, 7 Wheaton, 58.

† Skillern's Executors v. May's Executors, 6 Cranch, 267; Livingston v. Story, 12 Peters, 339; Chaires et al. v. United States, 3 Howard, 618; Whyte v. Gibbes, 20 Id. 542; Sibbald v. United States, 2 Id. 455.

of error, and removed the cause a second time into this court.

Brought here as the cause is by a second writ of error, it is settled law in this court that nothing is brought up for re-examination and revision except the proceedings of the subordinate court subsequent to the mandate.* It has been settled, says Mr. Justice Grier, by the decisions of this court, that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second, as it would lead to endless litigation.†

Different theories are put forth as to the ground assumed by the Supreme Court of the State in refusing to proceed with the case as directed in the mandate, and in entering the decree dismissing the petition, but the explanations given in the order of the court show that the court decided that the petition was a proceeding to obtain equitable relief in respect to the lands therein described, and that the legal title to the premises cannot be tried and adjudged under such a petition, and that inasmuch as the plaintiff had a plain, adequate, and complete remedy at law, the suit could not be maintained.

Presented as the proposition was as a reason for not executing the mandate of this court, the question as to its sufficiency is one which must necessarily be determined by this court, else the jurisdiction of the court will always be dependent upon the decision of the State court, which cannot be admitted in any case.

State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. Such a question, that is, the question whether the legal title was

* Roberts v. Cooper, 20 Howard, 467.

† Sizer v. Many, 16 Howard, 98; Corning v. Iron Co., 15 Id. 466; Himely v. Rose, 5 Cranch, 315; Martin v. Hunter, 1 Wheaton, 355.

in the plaintiff, and whether or not he had a plain, adequate, and complete remedy at law, might have been raised in the court of original jurisdiction, and perhaps it might have been raised here when the case was before the court upon the first writ of error, but it is clear that it was too late to raise any such question after the whole case had been decided and the cause remanded for final judgment.* Confirmation of that proposition of the most decisive character is found in the statute law of the State. Prior to the commencement of this suit the legislature of the State abolished all forms of pleading based on the distinction between law and equity, and enacted that "there shall be in this State *but one form of action* for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action."†

Suits may be instituted in courts of record by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause of or causes of action and the remedy sought.‡

Section three of article six enacts that the first pleading on the part of the plaintiff is the petition, which shall contain: (1.) The title of the cause, specifying the name of the court and county in which the action is brought, and the names of the parties to the action. (2.) A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. (3.) A demand of the relief to which the plaintiff may suppose himself entitled.§

Corresponding regulations are also enacted in the next section in relation to defences, which provides that the only pleading on the part of the defendant is either a demurrer or an answer; and the forty-eighth section provides that every material allegation in the petition not specifically controverted in the answer, and every material allegation in the answer of new matter, constituting a counter claim, not

* Hipp v. Babin, 19 Howard, 278; Parker v. Woollen Co., 2 Black, 551. Noonan v. Bradley, 12 Wallace, 129.

† 2 Revised Statutes, 1216. ‡ Ib. 1222. § Ib. 1229.

specifically controverted in the reply, shall, for the purposes of the action, be taken as true.*

By the same statute it is enacted that the defendant may demur to the petition when it shall appear upon the face thereof, either—(1.) That the court has no jurisdiction of the person of the defendant *or the subject-matter of the action.* (2.) That the plaintiff has not legal capacity to sue. (3.) That there is another action pending between the same parties for the same cause of action in the State. (4.) That there is a defect of parties plaintiff or defendant. (5.) That several causes of action have been improperly united. (6.) That the petition does not state facts sufficient to constitute a cause of action. (7.) That a party, plaintiff or defendant, is not a necessary party to a complete determination of the action.†

No other grounds of demurrer are allowed by the statutory rules of pleading. Those rules demand only a cause of action, but it need not be designated as legal or equitable, as a demurrer for want of form is not allowed; nor is the jurisdiction of the court, in any way, affected by forms.

Such objections as those enumerated in the sixth section, if they do not appear on the face of the petition, may be taken by answer, and the tenth section expressly enacts that "if no such objection be taken, *either by demurrer or answer*, the defendant shall be deemed *to have waived the same*," excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action.

It is not denied, nor can it be, that the plaintiff stated a good cause of action in his petition, and it is equally clear that he proved it, and that he prayed for the very relief he is entitled to receive; and as the law of the State allows of but one form of action for the enforcement or protection of private rights, the court is of the opinion that the objection under consideration is entirely without merit, as such an

* 2 Revised Statutes, 1230–1238. † Ib. 1231

objection is not a valid one under the statutory rules of pleading prescribed in that State.

Suppose the general rule, however, to be otherwise, still the court is of the opinion that the objection, even if it had been made earlier, could not avail the defendants, as they did not make it *by demurrer or in the answer*, as the express provision of the statute is that unless it is made by demurrer or answer "the defendant shall be deemed to have waived the same."

Justice requires that that rule shall be applied in this case, as the case has been pending more than ten years, having been twice heard in the Common Pleas, once in the Supreme Court of the State, twice before the present hearing, including the hearing on the motion, in this court, and a second time in the Supreme Court of the State, and is now here on a second writ of error after this court has decided that the plaintiff has a complete, perfect, and unqualified right, under the patent granted to the original donee or his legal representatives.

Unless the rule suggested is applicable in this case it is difficult to imagine a case where it would be, as the petition presents every fact constituting the cause of action, and it cannot be denied that the relief prayed is appropriate to the cause of action alleged, and the practice in such a case is, under the system of pleading adopted in that State, that the court will give the relief, no matter whether it be legal or equitable, if the facts alleged are fully proved, as the rule is that if the facts stated in the petition give a right of action the plaintiff ought to recover.* Where a cause is tried by a court without a jury, the Supreme Court of the State will affirm the judgment if the facts found support the judgment.† Under the code the plaintiff is entitled to all the relief that would formerly have been afforded him both by a court of law and equity.‡ If the defendant has answered,

* Scott v. Pilkington, 15 Abbott's Practice Reports, 285.

† Robinson v. Rice, 20 Missouri, 236; Butterworth v. O'Brien, 24 Howard's Practice Reports, 438.

‡ Rankin v. Charless, 19 Missouri, 493; Winterson v. Railroad Co., 2 Hilton, 392; Patrick v. Abeles, 27 Missouri, 185.

the court may grant the plaintiff any relief, under the code, consistent with the case made by the complaint and embraced within the issue.* So, where the facts are sufficiently stated in the petition, the Supreme Court of the State hold that the plaintiff may have such judgment as the facts stated will give him, although he may have asked for a different relief in the prayer of his petition.† Exactly the same rule is laid down in numerous adjudications in other States, and those of very high respectability, showing that such is the general rule in many jurisdictions, and it is believed that no case can be found where a different rule has ever been adopted in a case finally determined in the Supreme Court of Errors, and remanded to the subordinate court under a mandate directing the subordinate court to execute the decree of the appellate tribunal. Where a defendant put in his answer, instead of a demurrer, and the cause came to be heard on the merits, Chancellor Kent held that it was too late to object to the jurisdiction of the court on the ground that the plaintiff might have pursued his remedy at law.‡ After a defendant has put in an answer to a bill in chancery, submitting himself to the jurisdiction of the court, it is too late, says Chancellor Walworth, to insist that the complainant has a perfect remedy at law, unless the court is wholly incompetent to grant the relief sought by the bill.§

Such a defence was never made in the case until the first opinion of the court heretofore delivered in the case was read in court and published. In that opinion the court decided that Labeaume did not acquire the legal title to the tract of 4 x 4 arpents, under the patent granted to him, as

* Marquat v. Marquat, 12 New York, 341.

† Miltenberger v. Morrison, 39 Missouri, 78; Meyers v. Field, 37 Id. 434.

‡ Underhill v. Van Courtlandt, 2 Johnson's Chancery, 369; Livingston v. Livingston, 4 Id. 290.

§ Grandin v. Le Roy, 2 Paige, 509; Hawley v. Cramer, 4 Cowen, 727; Ludlow v. Simond, 2 Caines's Cases, 56; Le Roy v. Platt, 4 Paige, 81; Davis v. Roberts, 1 Smedes & Marshall's Chancery, 550; Osgood v. Brown et al., 1 Freeman's Chancery, 400; May v. Goodwin, 27 Georgia, 353; Burroughs v. McNeill, 2 Devereux & Battle's Equity, 300; Rathbone v. Warren, 10 Johnson, 595.

the saving clause in the patent reserved any valid adverse right which may exist to any part of the tract; that the patent granted to Joseph Brazeau at the same time never became operative, as he refused to accept the same, and returned it to the land department; that the subsequent action of the Secretary of the Interior in cancelling the same, and in ordering a new survey, was authorized by law; that Joseph Brazeau, by virtue of that survey, and the patent granted to him June 10th, 1862 acquired the legal title to the tract of 4 x 4 arpents, notwithstanding the saving clause in the patent, as he was the rightful owner of the incomplete title to the same, as acquired by the concession granted under the former sovereign. Directed, as the court below was, to proceed in conformity to the opinion of the court, it is quite clear that it was their duty to reverse their judgment and to grant to the plaintiff the relief prayed in his petition, that is, to enter a decree divesting out of the defendants all the right, title, and interest acquired or claimed by them and each of them from the other claimant, or any one claiming under him, and invest the same in the plaintiff, and to put him in possession of the premises.

Such being the conclusion of the court, it only remains to decide what disposition shall be made of the case. Having been once before remanded and the cause being here upon a second writ of error, the court, under the Judiciary Act, may at their discretion remand the same a second time or "proceed to a final decision of the same and award execution."* Somewhat different rules are enacted in the second section of the act of the 5th of February, 1867, which justify the conclusion that the court in such a case, under that regulation, may at their discretion, though the cause has not before been remanded, proceed to a final decision of the same and award execution, or remand the same to the subordinate court.† Much discussion of those provisions is unnecessary, as it is clear that the court, under either, possesses the power to remand the cause or to proceed to a final decision. Judg-

* 1 Stat. at Large, 86. † 14 Id. 387.

ing from the proceedings of the State court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain and not without an established precedent.* In causes remanded to the Circuit Courts, if the mandate be not correctly executed, a writ of error or appeal, says Mr. Justice Story, has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. Writs of error from the judgments of State courts have the same effect as writs of error from the Circuit Courts, and the act of Congress in its terms provides for proceedings where the same cause may be a second time brought up on a writ of error to this court. It was contended in that case that the former judgment of this court was rendered in a case not within the jurisdiction of the court, to which the learned justice, as the organ of the court, gave several answers. In the first place, he said, "it is not admitted that, upon this writ of error, the former record is before" the court, as the error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. He also proceeds to show that a second writ of error does not draw in question the propriety of the first judgment, adding that it is difficult to perceive how such a proceeding could be sustained upon principle, and that it had been solemnly held in several cases that a final judgment of this court is conclusive upon the parties and cannot be re-examined. Suffice it to say the rule is there settled, that where the cause has once before been remanded and the State court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party; nor is that a solitary ex-

* Martin v. Hunter, 1 Wheaton, 354.

ample, as the decree in Gibbons *v.* Ogden,* was also entered in this court.

It follows that that part of the decree of the Supreme Court of the State dismissing the petition must be reversed, with costs, and that a decree be entered in this court for the plaintiff, that the tract of 4 x 4 arpents claimed by the plaintiff was confirmed by the commissioners to Joseph Brazeau, and that the final survey, and the patent of June 10th, 1862, issued to him or his legal representatives, gave him a complete title to the tract, and that the same tract, as meted and bounded in the petition, be decreed to the plaintiff, and that all the right, title, and interest of each and every one of said defendants in and to said tract of land, be divested out of said defendants and be vested in and passed to the plaintiff, to have and to hold to the said plaintiff, his heirs and assigns, forever.

Apart from that, a claim is also made by the plaintiff for the rents and profits, and the record shows that the cause in the court where the original decree was entered was referred to a master to ascertain the amount, and that the master made a report which was confirmed by the court, but the decree of that court was reversed in the Supreme Court of the State, which would make it necessary that a new estimation of the rents and profits should be made before the claim can become the proper subject of a decree. Some reference was made to the subject in the argument, but it was by no means fully discussed. Years have elapsed since the hearing was had before the master, and in the meantime many changes no doubt may have taken place in respect to the occupation of the premises, and many of the occupants of the different portions of the tract may have deceased; great changes may also have taken place in the value of the property and in the state and condition of the improvements, which plainly renders it impracticable to do justice between the parties without a new reference, which is a matter of jurisdiction that this court is not inclined to exercise except

* 9 Wheaton, 239.

when it becomes absolutely necessary to prevent injustice. Evidently such a claim must depend very largely upon the statutory provisions of the State, and to those the court have not been referred. Unless the statutes present some insuperable difficulties in the way of such a recovery, no doubt is entertained that the plaintiff will be entitled to enforce that claim in such form of remedy as is allowed by the local law. Whoever takes and holds possession of land to which another has a better title is in general liable to the true owner for all the rents and profits which he has received, whether the owner recover the possession of the premises in an action at law or in a suit in equity.* Depending, as such a claim necessarily must, very much upon the statutes of the State, the court, on the authority of the case of *Miles* v. *Caldwell*,† as well as for the other reasons suggested, deems it proper to leave the party to prosecute the claim as he may be advised in the tribunals of original jurisdiction, as better suited to investigate and adjudicate such a claim than a court of errors. Besides the relief already described, the decree will also direct that the plaintiff be put in possession of the premises, and for that purpose he will be entitled to a writ of possession to be issued by the clerk of this court.

DECREE REVERSED, and the following

DECREE ENTERED.

The cause having heretofore been argued by the counsel of the respective parties, and submitted to the court for a decision upon the plaintiff's petition and the answer of the defendants, and the proofs, exhibits, documents, stipulations, and other evidence in the cause, as appears by the authenticated transcript of the record annexed to and returned with the writ of error, and mature consideration having been had thereon, it is—

ORDERED, ADJUDGED, AND DECREED, that so much of the decree

* Green v. Biddle, 8 Wheaton, 70; Chirac v. Reinicker, 11 Id. 296; Same Case, 2 Peters, 617.

† 2 Wallace, 44.

Decree entered.

of the Supreme Court of the State as dismissed the petition of the plaintiff be, and the same is hereby, reversed with costs. And it is further ordered, adjudged, and decreed, that the tract of 4 x 4 arpents claimed by the plaintiff was confirmed by the board of commissioners to Joseph Brazeau or his legal representatives, and that the said tract of land as meted and bounded, justly and equitably belongs to the plaintiff, as alleged in his petition, and as shown by the survey of the 8th of May, 1862, and by the patent of the 10th of June following, duly executed and signed by the President.

Wherefore, this court proceeding to render such decree in the case as the Supreme Court of the State should have rendered, it is ORDERED, ADJUDGED, AND DECREED, that the said tract of land, being the said 4 x 4 arpents claimed by the plaintiff, and meted and bounded as follows, viz.: Beginning at a point on the right bank of the Mississippi River, the northeast corner of survey No. 3342, in the name of Esther, a free mulatress, or her legal representatives, and the southeast corner of Louis Labeaume's survey, No. 3333; thence south 74 degrees 30 minutes west, with the southern boundary of said Labeaume's survey, and the northern boundary of the said Esther survey, to the northwest corner of the said Esther survey; thence north 23 degrees west, 776 feet 8 inches, to a stone; thence north 74 degrees 30 minutes east, 776 feet 8 inches, to a point on the right bank of the Mississippi River; thence down and along the right bank of said river to the beginning; be and the same is hereby decreed to the plaintiff, and all the right, title, and interest of each and every one of said defendants, in and to said tract of land, is hereby divested out of said defendants, and each of them, and that the same is vested in and by virtue of the patent passed to the plaintiff; to have and to hold to the said plaintiff, his heirs and assigns, the said tract of land so passed to him and his heirs and assigns forever, being the same which is covered by the survey No. 3343, approved May 8th, 1862, and patented to Joseph Brazeau, 10th June, in the same year, as appears by the record.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the plaintiff recover the possession of the said tract of land as herein meted and bounded, and that a writ of possession issue for that purpose in the usual form, directed to the marshal of this court, duly executed by the clerk, and under the seal of this court.

Mr. Justice SWAYNE, Mr. Justice STRONG, and Mr. Justice BRADLEY, dissented.

Mr. Justice HUNT did not hear the argument, and took no part in the judgment.

BARNES v. THE RAILROADS.

The one hundred and sixteenth section of the Internal Revenue Act of June 30th, 1864, amended by the act of March 2d, 1867, laid a tax of 5 per cent. on incomes derived from any source whatever. The one hundred and nineteenth section enacted "that the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year until and including the year 1870, and no longer"

The one hundred and twenty-second section, as subsequently amended, imposed a tax of 5 per cent. on all interest payable and dividends declared by any railroad or canal company, &c., whenever payable; to be paid by the company and deducted from the amount payable to the bond or stockholder.

Held (by a court nearly equally divided, and the majority who agreed in the judgment not agreeing in the grounds of it), that interest or dividends which accrued prior to the 1st of January, 1870, were taxable under the act, though payable or declared on or after the date named.

ERROR to the Circuit Court for the Eastern District of Pennsylvania; the case being thus:

The one hundred and sixteenth section of the act of June 30th, 1864, as amended by the thirteenth section of the act of March 2d, 1867,* enacts:

"SECTION 116. That there shall be levied, collected, and paid annually upon the gains, profits, and income of every *person* residing in the United States, or of any *citizen* of the United States residing abroad, whether derived from *any kind of property*, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, *or from any other source whatever*, a tax of 5

* 13 Stat. at Large, 281; 14 Id. 477.

per centum on the amount so derived over $1000, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax."

The one hundred and seventeenth section of the same act, as amended in the same way, required that there should be included, *inter alia*, in the estimate of gains, profits, and income, which the act made it obligatory on the taxpayer to return, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise,

"Except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per-centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted."

The one hundred and eighteenth section related to the manner of the party's making and the assessor's obtaining returns of that portion of the taxpayer's income which was to be paid by such taxpayer directly.

The one hundred and nineteenth section, as amended by the already-mentioned section of the act of March 2d, 1867,* enacts:

"SECTION 119. That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or *before the 30th day of April in each year, until and including the year* 1870, *and no longer.*"

* 13 Stat. at Large, 283; 14 Id. 480.

Statement of the case.

Mr. Justice SWAYNE, Mr. Justice STRONG, and Mr. Justice BRADLEY, dissented.

Mr. Justice HUNT did not hear the argument, and took no part in the judgment.

BARNES v. THE RAILROADS.

The one hundred and sixteenth section of the Internal Revenue Act of June 30th, 1864, amended by the act of March 2d, 1867, laid a tax of 5 per cent. on incomes derived from any source whatever. The one hundred and nineteenth section enacted "that the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year until and including the year 1870, and no longer"

The one hundred and twenty-second section, as subsequently amended, imposed a tax of 5 per cent. on all interest payable and dividends declared by any railroad or canal company, &c., whenever payable; to be paid by the company and deducted from the amount payable to the bond or stockholder.

Held (by a court nearly equally divided, and the majority who agreed in the judgment not agreeing in the grounds of it), that interest or dividends which accrued prior to the 1st of January, 1870, were taxable under the act, though payable or declared on or after the date named.

ERROR to the Circuit Court for the Eastern District of Pennsylvania; the case being thus:

The one hundred and sixteenth section of the act of June 30th, 1864, as amended by the thirteenth section of the act of March 2d, 1867,* enacts:

"SECTION 116. That there shall be levied, collected, and paid annually upon the gains, profits, and income of every *person* residing in the United States, or of any *citizen* of the United States residing abroad, whether derived from *any kind of property*, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, *or from any other source whatever*, a tax of 5

* 13 Stat. at Large, 281; 14 Id. 477.

per centum on the amount so derived over $1000, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax."

The one hundred and seventeenth section of the same act, as amended in the same way, required that there should be included, *inter alia*, in the estimate of gains, profits, and income, which the act made it obligatory on the taxpayer to return, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise,

"Except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per-centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted."

The one hundred and eighteenth section related to the manner of the party's making and the assessor's obtaining returns of that portion of the taxpayer's income which was to be paid by such taxpayer directly.

The one hundred and nineteenth section, as amended by the already-mentioned section of the act of March 2d, 1867,* enacts:

"SECTION 119. That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or *before the 30th day of April in each year, until and including the year* 1870, *and no longer.*"

* 13 Stat. at Large, 283; 14 Id. 480.

The one hundred and twenty-second section of the same act as amended by the ninth section of the act of July 13th, 1866,* enacts:

"SECTION 122. That any *railroad*, canal, turnpike, canal navigation, or slack-water *company*, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, *shall be subject to and pay a tax of* 5 *per centum* on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatever party or person the same may be payable, including non-residents, whether citizens or aliens.

"*And said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of* 5 *per centum;* and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise."

This is the material part of the section; another paragraph, however, being referred to in one of the opinions given further on in the case, as bearing on the question hereafter stated as in controversy, the paragraph, which runs thus, is added:

"And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the 10th day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six

* 13 Stat at Large, 284; 14 Id. 138.

months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of $1000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of the law in other cases of neglect or refusal."

The one hundred and twenty-third section of the same act, as amended by the thirteenth section of the act of March, 1867, enacted:

"SECTION 123. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators, representatives, and delegates in Congress, when exceeding the rate of $1000 per annum, a tax of 5 per centum on the excess above the said $1000; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of 5 per centum; and the pay-roll, receipts, or account of officers or persons paying such tax as aforesaid, shall be made to exhibit the fact of such payment."

In this state of statutory enactment, the Philadelphia and Reading Railroad Company (a corporation of Pennsylvania) on the *22d of December*, 1869, declared a dividend, payable *January the 17th*, 1870, on their stock, as part of the profits made between the 1st of July and 1st of December, 1869; the dividend being made in pursuance of a power in the company's charter which authorized its managers to declare

at least twice in each year such dividend of the company's profits as they deemed advisable; the same to be payable at the expiration of ten days.

So too the Harrisburg, Portsmouth, and Mount Joy and Lancaster Railroad Company, having a large capital stock, and having issued bonds for money, with interest payable semi-annually on the 1st of January and July, declared *on the 10th of January*, 1870, a dividend on their stock as part of their income and gain made between the 1st of July, 1869, and the 1st of January following. Apart from this dividend a semi-annual instalment on the bonds fell due on the 1st of January, 1870.

In both the cases, and in the cases of several other railroad companies* which had made dividends, or were about to pay interest, the assessor of the district assessed a tax of 5 per cent. on this dividend. The companies refused to pay, and the collector, one Barnes, distrained. Thereupon the companies sued Barnes in trespass.

The question in the cases was whether the duration of the tax upon "interest or coupons, dividends or profits" of railroad, canal, and other companies, imposed by the 122d section, quoted above, was subject to the limitation fixed by the 119th section, taken in connection with the 116th section. In other words, whether a tax upon the profits, interest, or dividends mentioned in the said 122d section was authorized to be assessed and collected, where such profits were set apart or where such interest or dividends became due and payable *after* the 31st of December, 1869, and especially as in the second of the above-mentioned cases, where the dividend was declared after that date. The government contended that the limitation referred to was not applicable to the tax described in the 122d section, and that the assessment and collection thereof, upon interest, dividends, &c.,

* The Lehigh Valley Railroad Company; The Lake Superior and Mississippi Railroad Company; The Philadelphia and Trenton Railroad Company. The last-named company's dividend was declared January 19th, 1870, and was payable on the 1st of February.

due and payable subsequent to that date, were authorized; a position denied by the railroad companies and their stockholders and creditors.

The court below was of opinion that the tax was not authorized, and gave judgment accordingly. From that judgment the collector brought the cases here.

In this court the cases were twice argued. On the first argument, the court being then composed of eight judges, there was an equally divided bench. After the accession of Mr. Justice Hunt a new argument was ordered, and it was accordingly reargued by *Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the collector; and by Messrs. J. G. Gowen, Chapman Biddle, and Theodore Cuyler, for different railroad companies interested.*

Mr. Justice CLIFFORD, now, March 3d, 1873, delivered the judgment of the court in all the cases, dividing them, as they had been argued, into two classes; the first class being where the dividend was declared prior to the 1st of January, 1870, and made payable afterwards; the second where it had been both declared and made payable afterwards.

I. IN THE FIRST CLASS.

Power to lay and collect taxes for Federal purposes, being vested exclusively in Congress, it becomes necessary, whenever the validity of such a tax is drawn in question, to examine the act imposing the tax, as the question in every case must necessarily depend upon its true construction, unless it appears that the tax is not apportioned as required, or not uniform, or the object taxed is one not taxable for such a purpose.

Railroad companies indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, subject to interest or with coupons representing interest, are by the 122d section of the act of the 13th of July, 1866, made liable to the internal revenue tax imposed by that section.

Provisions upon the subject differing essentially from

those contained in that section had previously been enacted; but the Congress, on that day, amended the corresponding section in the prior law by striking out all after the enacting clause, and inserting in lieu thereof the section under consideration, which also provides that "any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company, carried to the account of any fund, or used for construction, shall be subject to, and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens."*

By the act incorporating the railroad company it was provided that the dividends of so much of the profits of the company as it should appear advisable to the managers should be declared at least twice in every year, payable to the stockholders subsequent to the expiration of ten days from the time it was so declared.

Apart from that it also appears that the railroad company, on the 22d of December, 1869, declared a dividend in money amounting in the whole to the sum of $1,527,531.59 on their capital stock, as part of their earnings, profits, incomes, and gains made, and which accrued between the 1st of July of that year and the 1st of December of the same year. None of these matters are controverted, but the dividend, though it accrued during the period described, and was declared at the date specified, was made payable to the stockholders on the 17th of January following, as appears by the record.

Due return of the said dividend, as required by law, was made by the railroad company to the assessor of the first collection district, and the proper revenue authorities assessed a tax of 5 per centum upon the said dividend, amounting to the sum of $76,376.58, which the railroad company was required to pay within the period prescribed by law.

* 14 Stat. at Large, 139.

Restatement of the case in the opinion.

Payment of the tax having been refused, after due notice given and demand made, the collector, and the other two defendants as his deputies, distrained the goods and chattels mentioned in the declaration to secure and enforce the payment of the tax, penalty, and interest, as directed in the warrant from the assessor. Distraint was made in due form, but the corporation plaintiffs, denying the legality of the tax, brought an action of trespass against the collector and his deputies in the State court to test that question, and the record shows that the suit, on the petition of the defendants, was regularly removed into the Circuit Court of the United States for trial. Both parties appeared in the Circuit Court, and the plaintiffs having filed their declaration the defendants pleaded the general issue, and also a special plea, in bar of the action, setting up substantially the same matters as those set forth in the preceding statement. Issue was joined upon the first plea, but the plaintiffs demurred to the second, insisting that the matters pleaded do not constitute any defence to the action which is the principal question in the case. Judgment was rendered for the plaintiffs in the Circuit Court, and the defendants sued out a writ of error and removed the cause into this court.

Questions of importance to the parties, it may be conceded, are presented in the record for the decision of the court, but it must be admitted that they are all mere questions as to the construction of the act imposing the tax, as it is not pretended that the object taxed is one not taxable for Federal purposes, nor that the regulations prescribed for the assessment and collection of the tax are subject to any constitutional objections. Stripped of every difficulty of that kind, as the case confessedly is, the great central question which arises is, what did the lawmakers mean when they enacted that "any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be

subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable?"

Congress, it is insisted by the United States, intended to tax that accrued fund in the hands of the railroad company, in whatever form it might be; whether it existed as accumulated interest or in coupons representing interest, or in a dividend declared, or in a special fund of any kind, and without respect to the time of payment or the person or persons to whom it was ultimately payable. Every element of that proposition is denied by the plaintiffs, and as a means of refuting it they have entered into an extended and critical review of all the principal features of the prior acts providing for the collection of internal revenue duties.

Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning by comparing the section or clause in question with prior statutes *in pari materiâ*, but it cannot be admitted that such a resort is a proper one where the language employed by the legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction.

Much criticism is bestowed upon the corresponding provisions in the prior acts in order to show that Congress never intended to tax the railroad company at all, and that the tax, in view of the circumstances, cannot be sustained against the shareholder as a tax on income for the half-year specified in the statement, as the dividend was not made payable to the stockholder until the 17th of January of the succeeding year; and the court, if the tax could be regarded as one imposed upon the shareholder, would be inclined to concur with the plaintiffs that a dividend, neither due nor payable to the shareholder within a given year, could not be taxed to the shareholder as income of that year under the internal revenue laws which were in operation at the time the tax in question was assessed and collected.

Concede all that and still the court is of the opinion that

the concession cannot benefit the plaintiffs, as the tax, by the very terms of the act imposing it, is a tax on the railroad company to be assessed and collected in the manner and by the means prescribed in the act imposing the tax, and having come to that conclusion it will not be necessary to examine very critically the machinery enacted in prior laws for the assessment and collection of income taxes against individuals, as the court is of the opinion that those regulations afford little or no aid in solving any material question involved in this record.

Attention was called during the argument to the fact that the railroad company is authorized, by the same section which imposes the tax, to deduct and withhold from all payments on account of any interest or coupons and dividends, due and payable as aforesaid, the tax of 5 per centum, and that the payment of the amount of the tax so deducted from the interest or coupons or dividends, and certified by the president or treasurer of the company, is made a discharge to the company for the amount of the tax so paid, deducted, and withheld, except where the company may have otherwise contracted.*

Attempt is made to invoke that provision as showing that the tax is a tax on the shareholder and not a tax on the railroad company, but the court is unable to perceive that the argument has any foundation whatever, as the provision does not contain a word inconsistent with the preceding part of the section, which in terms imposes the tax upon the railroad company.

Beyond doubt those two provisions should be construed together, and when so construed they are perfectly consistent and show to the entire satisfaction of the court that the plaintiffs are liable to pay the tax in controversy. They are so liable because it appears that they, as such company, having been indebted for money, issued bonds, or other evidences of indebtedness, payable with interest, or with coupons representing interest, in one or more years after date,

* 14 Stat. at Large, 189.

and that they declared a dividend in money due or payable to their stockholders as part of the earnings, profits, income, or gains of such company, and the section provides that such a company under such circumstances shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, and authorizes the company to deduct and withhold the amount of the tax from the dividend due or payable to their stockholders.

Different regulations for the assessment and collection of the income taxes of every kind were prescribed in the prior laws imposing internal revenue duties, but they were not in all respects satisfactory, and many controversies had arisen calling in question the action of the revenue officers in their efforts to enforce the collection of that branch of the public revenue. Contrariety of decision had resulted in some instances, and the Circuit Court had decided in one case that a railroad company could not deduct and withhold the amount of such a tax from a dividend due and payable to a non-resident alien, the presiding justice being of opinion that the language of the prior act did not warrant the conclusion that Congress intended to include such holders of the bonds or certificates in the category of persons liable to such an assessment.*

Congress, accordingly, in order to remove those difficulties, imposed the tax upon the railroad company, and enacted that the company should pay the same whenever and wherever the dividend should be payable, and to whatsoever party or person the same should belong, showing beyond the possibility of doubt that Congress intended to hold the railroad company absolutely and solely liable for the tax, reserving to the company the right, which is equally unqualified, of deducting and withholding from the dividend the amount of the tax, whether the dividend was due or payable to the stockholder before or subsequent to the payment of the tax, and wholly irrespective of the question

* Railroad Co. v. Jackson, 7 Wallace, 269; Jackson v. Railway Co., 2 Internal Revenue Record, 174.

whether the stockholder was a resident or non-resident, or citizen or non-resident alien.

Payment of the tax by the company is an absolute requirement, just as much so as if the company was the actual holder of the bonds and the real owner of the dividends, whether they deduct and withhold the amount from the dividends or not, and the fact that the company is permitted to do so, if they see fit, does not in the slightest degree change the relation of the company to the United States, as the taxpayers under that section of the law imposing internal revenue duties.

Confirmation of that view is also derived from the regulations for the assessment and collection of the tax contained in the same section, which require that a return shall be made and rendered to the assessor or assistant assessor on or before the 10th day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months, and that the return shall contain a true and faithful account of the tax, with a declaration annexed thereto, of the president or treasurer of the company, verifying that statement under oath or affirmation.

All these regulations apply to the company, and the provision is that the company, if they make default, either in rendering the return or in the payment of the tax, shall forfeit as a penalty the sum of $1000, and that the tax and the penalty shall be assessed and collected as in other cases of neglect or refusal.

Special reference is made by the plaintiffs to the regulation enacted in the 119th section of the act of the 2d of March, 1867, that "taxes on income herein imposed" shall be levied on the 1st day of March in each year, and be due and payable on or before the 30th day of April in the same year, as inconsistent with the theory assumed by the United States, but the court is not able to perceive that the objection is entitled to any weight, as the income taxes therein imposed are required to be assessed on the incomes of individuals, and the 117th section of the same act expressly authorizes the individual to omit from his return of gains,

profits, and income the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions and pay the same to the officer authorized to receive such payments. Important amendments were made by that act to some of the sections of the prior act, but the 122d section, under which the tax in controversy was assessed, was left in full force and operation, without any change, alteration, or modification of any kind.

Such a dividend as that made by a railroad company is not required to be included in the return made by the shareholder of his gains, profits, and income, but is expressly required by law to be returned by the president or treasurer of the railroad company, as before explained, and the act of Congress in terms provides that the company shall be liable to and pay the tax, no matter when or where or to whatsoever party or person the dividend may be payable.*

Prior to that time the rule had been different, as the 116th section of the act of the 3d of March, 1865, expressly required that the amount of income received from such institutions by a shareholder should be included in his return to the assessor, but the power to lay and collect taxes for Federal purposes is vested in Congress, and Congress having repealed that provision and substituted another in its place, requiring the return to be made by the president or treasurer of the company, and having finally authorized the shareholders to omit the amounts received from that source from their returns, the argument would seem to be concluded unless it be assumed that some one or all of these regulations transcend the power of Congress under the Constitution, which is not pretended.†

Argument to show that a railroad company may be taxed for Federal purposes is certainly unnecessary, as the theory is not controverted, and the proposition that the dividends of such a company are the proper objects of such taxation is also self-evident. Congress may tax such a dividend be-

* 14 Stat. at Large, 189 and 478.

† 13 Id. 479; 14 Id. 478.

fore it is paid to the holders of the securities, either as the property of the company or of the shareholders, at the election of Congress, nor can either party have any just ground of complaint if proper regulations are enacted to apportion and distribute the burden.

Power to tax either the company or the shareholder being admitted, the only question which can arise in this case is a question of construction, and the court is of the opinion that the act of Congress imposes the tax in controversy upon the railroad company. Having come to that conclusion it is not necessary to enter into any discussion of the question whether the action of trespass will lie in such a case against the collector of the revenue. He acts under a warrant or other process from the assessor, and it may well be doubted whether he can be regarded as a trespasser unless it appears that he exceeds his jurisdiction. Several cases decide that the party taxed must pay the tax and bring assumpsit to recover back the money.*

Neither party, however, raised any such questions in the court below, nor has it been discussed in this court, and in view of those facts the court is not inclined to decide it at the present time.

II. IN THE SECOND CLASS OF CASES.

Internal revenue taxes were assessed against the corporation plaintiffs by the assessor of the first collection district charged with that duty, and the plaintiffs denying the legality of the assessment refused to pay the tax, and the collector having distrained the goods and chattels mentioned in the declaration, as the means of enforcing payment, the plaintiffs brought an action of trespass against him and his deputy, claiming damages for the alleged unlawful seizure and detention of the goods and chattels.

Enough appears in the record to show that the plaintiffs are a railroad company; that being indebted for money to

* Philadelphia v. Collector, 5 Wallace, 731; Assessor v. Osbornes, 9 Id. 574.

a large amount they issued bonds for the same, or other evidences of indebtedness, payable with interest, or with coupons representing interest, in one or more years subsequent to their date. On the 10th of January, 1870, the railroad company declared a dividend in money amounting to the sum of $43,567.63 on their capital stock as part of their income and gains made, and which accrued between the 1st of July, 1869, and the 1st of January following.

Apart from the dividend an instalment of semi-annual interest also fell due at the same time, amounting to $21,000, which accrued during the same six months for which the dividend of the income and gains was declared. Due return was made by the railroad company of the amount of the dividend and interest to the assessor of internal revenue for the first collection district, and a tax of 5 per cent. on the amount was assessed by the proper revenue authorities, which is the tax in controversy, and for which the distraint was made, as alleged in the pleadings.

Detailed statement of the pleadings is unnecessary, as they are the same as in the preceding case, and all the questions presented for decision are the same except one, which will be made the subject of special examination. Judgment was rendered for the plaintiffs in the Circuit Court, and the defendants brought a writ of error and removed the cause into this court.

Such a dividend, declared by such a company, in money, due or payable to their stockholders as part of the earnings, profits, income, or gains of the company, it was decided in the preceding case rendered the company liable to the tax of 5 per cent. on the amount of such income or gains, as more fully explained in the opinion delivered in that case, and the court is of the opinion that the tax on the semi-annual instalment of interest is within the same principle, and that it must be governed by the same rule.

Suppose that is so, still it is insisted by the plaintiffs that the rule there adopted is not applicable in this case, as the dividend was not declared within the six months speci-

fied in the pleadings, and because neither the dividend nor the interest was due or payable to the stockholders until the 10th of January following. Beyond doubt the two cases differ in that respect, and the question in this case is whether the admitted fact that the dividend was not declared within the half-year during which the income and gains were made takes the case out of the rule adopted in the other case.

Much weight would be due to that suggestion if the tax was a tax upon the shareholder, but the court has already decided that the tax imposed by that provision is a tax upon the railroad company, and the court adheres to that conclusion, which is confirmed by the fact that the object made taxable by that section is not only "any dividend declared," but the language also extends to "all profits of such company carried to the account of any fund, or used for construction," showing that Congress intended that such company shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable and to whatsoever party or person the same may ultimately belong.

Tested by these considerations it is quite clear that it is the fund which accrued within the half-year which Congress intended to tax, and the record shows that every dollar of the fund taxed in this case accrued within the last six months of the year preceding the time when the dividend was actually declared.

Although the dividend was not declared until the 10th of January, 1870, yet it is true that the object taxed is the fund which accrued within the last six months of the preceding year, and it is certain that the fund taxed does not include a dollar of the income or gains of the company for the succeeding year. Concede that, and still it is insisted by the plaintiffs that the dividend cannot be regarded as income and gains of the company for the six months specified in the pleadings, because it was not actually declared as such by the company within that period, but the court is not able to adopt that construction of the act, as it would enable the

company to postpone the payment of such a tax for six months or even for a year whenever they pleased, by omitting to declare a dividend, which would be inconsistent with the plain intent of Congress as manifested by the language employed in the section imposing the tax.

Taxes illegally exacted under the revenue laws of the United States may be recovered back, if paid under protest, in an action of assumpsit against the collector, but the person taxed cannot enjoin the collector from enforcing payment, and very grave doubts are entertained whether trespass against the collector is a proper remedy under existing laws. No such error, however, having been assigned in the case the court will not decide the point at the present time.*

JUDGMENT REVERSED IN EACH CLASS OF CASES, and the causes remanded for further proceedings in conformity to the opinion of the court.

BRADLEY, J.: I concur in the judgment of the court on the ground that the 119th section of the Internal Revenue Act, in affixing a limit to the period for imposing and collecting the income tax, referred in express terms only to the annual tax returnable and payable by individuals, and to no other tax imposed by the act.

Mr. Justice STRONG (with whom concurred the CHIEF JUSTICE and Justices DAVIS and FIELD), dissenting.

I am unable to concur in the construction which a majority of my brethren have given to the acts of Congress relative to the income tax, and consequently I dissent from the judgments which have been directed in these cases. The reasons for this dissent I propose now to give, as briefly as I can.

Whatever may be said of the earlier acts of Congress, that of June 30th, 1864,† as amended by the acts of 1866 and 1867, provided a complete system of taxation upon incomes. The 116th section, which is the first that had reference to the subject,‡ enacted that there should be levied,

* 14 Stat. at Large, 475, § 10. † 13 Id. 284. ‡ 14 Id. 477.

collected, and paid annually upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, *interest*, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any source whatever*, a tax of five per centum on the amount so derived over $1000, and that a like tax should be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States and not citizens thereof. The same section declared that the tax therein provided for should be assessed, collected, and paid upon the gains, profits, or income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said duty. What that time was directed to be, as well as the duration of the tax, was defined by the 119th section, which enacted as follows: "That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year."

No language could be more comprehensive. It embraces income of every description, whether derived from labor or property, and it particularly mentions income derived from *interest* and *dividends*, adding the words, "or from any source whatever." It is not to be doubted that it includes income derived from dividends on stock held in railroad companies, and income received as interest on bonds of such companies. This section, I think, is the only one that imposes any income tax. All the other sections, from the 117th to the 123d inclusive, are classified under the title "income," and they relate to it, but they are provisions for the ascertainment of the amount, and for the collection of the tax. None of them impose any new or different tax upon the taxpayer. They all have reference to that income made taxable by the 116th section. That, it was known, might be derived from various sources, and provision was made for ascertaining its amount, as well as for collecting the tax upon every item

composing it. The 117th section, as amended by the act of 1867, required that there should be included in the estimate, *inter alia*, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise, "except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted." But these exceptions recognize the dividends and interest received from such companies, and the gains from the salaries or pay of United States officers, as a part of the taxpayer's income. It is his share of the gains and profits of the companies, or corporations, and not the gains of the companies themselves which the exceptions direct shall not be included. The reason of this is too obvious to escape notice, unless it be forgotten that the 117th section is but part of a system for levying and collecting an income tax. If it be construed, as it must be, in connection with the other sections relating to the same subject, it is plain that its purpose was to ascertain only that part of a person's income, the tax upon which the next following section (the 118th) required should be paid by the taxpayer himself to the collector, leaving that part of his income, which consisted of his share of the gains and profits of institutions or corporations whose officers, as required by law, withheld a per centum of its dividends and paid the same to the officer authorized to receive it, to be ascertained and the tax thereon to be collected by the companies themselves. A special mode of collecting the tax on such dividends, interest, and government salaries was intended to be provided, and was actually provided.

Passing by the 118th and 119th sections, which relate to the manner of making returns of that part of a taxpayer's

income the tax upon which he is required to pay directly to the collector, I come to the 120th, 121st, 122d, and 123d sections. They all relate to that portion of the taxpayer's income excepted by the 117th section from the return which he is required to make to the assessor by the 118th section. They provide for the collection of the tax upon that portion. The 120th imposes a duty of 5 per centum on all dividends in scrip and money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policyholders, or depositors, as part of the earnings, income or gains of any bank, trust company, or savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual. This tax the banks and other institutions described were required to pay, and they were authorized to withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid the said duty of 5 per centum. It is unnecessary to notice particularly the 121st section.

The 122d section enacted "that any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, . . . shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, and dividends, due and payable as aforesaid, the tax of 5 per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company,

shall discharge said company from that amount of the dividend, or interest, or coupons on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise."

The 123d section enacted that there should be levied, collected, and paid on the excess above $1000 of all salaries of officers of the United States a tax of 5 per centum, and it required paymasters and disbursing officers to deduct and withhold said tax when making payment to such officers.

All these sections, I think, relate to the tax upon income, whether derived from interest, dividends, or from any source whatever, imposed by the 116th section, and their sole purpose was, not to impose a new tax, but to provide a different mode of collection from the taxpayer. The dividends, interest, and salaries mentioned in them were not required by the 117th and 118th sections to be included in the general estimate, or in the return made to the assistant assessor, because their amount was as certainly ascertainable by the corporations or officers required to collect the tax as it could have been by any return of the taxpayer, and it was more easily and certainly collectible.

I need not say more upon this branch of the case. If there could be a doubt in any mind that the tax for the collection and payment of which provision was made in the 122d section was a part of that imposed upon income by the 116th, it must be set at rest by the decision in *Jackson* v. *The Northern Central Railway*, a case tried in the Circuit Court of the United States for the District of Maryland, and subsequently removed here. The primary question in that case was whether the tax on interest payable by railroad companies (namely, the tax spoken of in the 122d section) was chargeable against non-resident aliens, and it was ruled by the Chief Justice that it was not. The ruling was based upon the position that the tax on such interest was the same as that imposed by the 116th section of the act of 1864, viz., a part of the income tax, and that as the 116th section did not include non-resident aliens, the tax on interest spoken

of in the 122d was not chargeable against them—the deduction of 5 per cent. being only a mode of collecting the income tax. This decision was subsequently affirmed in the Supreme Court,* and the language of the court was as follows: "The decision was placed mainly upon the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad [an exclusion only found in the 116th section], and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view." I understand this case as determining several things: *First*, that the 116th and 122d sections of the act of 1864 are parts of one system, devised for income taxation; *second*, that the tax on railroad dividends, and on interest of railroad indebtedness, is not a different tax from that imposed upon income generally; and, *third*, that the 122d section was intended merely to provide a special mode of collection for a part of the tax.

This decision was made, it is true, before the act of 1864, as amended by the act of 1866, had been again amended by the act of 1867, but the later amendment made no other change in the law than extending its provisions so as to embrace dividends and interest payable to non-resident aliens.

Regarding it, then, as an incontrovertible proposition that the tax mentioned in the 122d section is not a different tax from that imposed by the 116th, that it is a part of the tax levied upon income generally, no matter from what source derived, and that the purpose of the section was to provide a special mode of collection of the tax upon income consist-

* 7 Wallace, 262.

ing of railroad interest and dividends, I cannot comprehend why it did not expire with the expiration of the tax upon other income. When that expired was determined by the 119th section, which was in the following words: "The taxes on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June of each year until and including the year 1870, and no longer." Whatever else this clause may mean, it manifestly embraces in terms taxes on income from any source—all income upon which the act imposed a tax. It excepts none. It does not speak of taxes on income, a return of which is required to be made by the taxpayer to the assessor, but its language is "*taxes on incomes herein imposed.*" As the 119th section imposed no tax, the reference must be to the income tax imposed by all parts of the act—to all of them, as well those upon railroad dividends, &c., as well as those imposed upon dividends of telegraph, manufacturing, or other companies, or upon income from any source.

The clause is also a clear enactment that the income to which it refers should not be subject to a tax unless derived or received prior to January 1st, 1870. No one who carefully reads the whole act can doubt that the 119th section must be construed in connection with the 116th, and that it speaks of the income made taxable by that section. That enacted, as has already been noticed, that the tax thereby imposed, including the tax on income derived from dividends and interest, should "be assessed, collected, and paid upon gains, profits, and income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax." Incontestably, therefore, though the last annual tax was required to be levied on the 1st of March, 1870, it was required to be a tax on the income of the year 1869. Hence it is plain the provision that the taxes on income should be levied on the 1st of March in each year until and including the year 1870, and no longer, must mean that the income of 1870 should not be subject to taxation.

I think, therefore, these two propositions are beyond any

reasonable doubt, or I should so think were it not that a majority of my brethren are of a different opinion.

1. The tax upon dividends made, and interest payable, by railroad, canal, turnpike, canal navigation, and slack-water companies, for the payment and collection of which provision was made by the 122d section, was a tax on income within the meaning of the 116th section, and not a different and independent tax.

2. That the tax upon all income, without regard to its source, "derived" or "received" by the taxpayer prior to January 1st, 1870, expired with the close of the next preceding year.

These conclusions are demanded, I think, alike by the letter of the act of Congress and by its spirit. To my mind they seem to be the only reasonable construction that can be given to it. I see nothing to warrant the belief that Congress intended to impose a burden upon income from one species of property greater or longer continued than that imposed upon income from other property, or that they intended to discriminate against Federal officers and compel them to pay a tax on their salaries, after taxes upon all other salaries had ceased. The dividends received by a shareholder of a railroad company, or a canal, turnpike, or slack-water navigation company, or of a banking, trust, or insurance company, are, in every sense, as much his income as are the dividends he may receive from any other company; for example, a bridge, or a manufacturing corporation. So is the interest received for loans to a railroad company as truly income of the bondholder as is the interest received by him from permanent loans to any other corporation, or to natural persons. Was it the intention of Congress to enact that one who lent his money to a telegraph company, or to a mining or manufacturing company, should be exempt from a tax upon his interest received after December 31st, 1869; but that one who lent to a canal or railroad company should continue to pay the tax indefinitely and for all time? Is such a reasonable construction of the act of 1864 and its amendments? I cannot believe it. I cannot attribute to

Congress any such injustice. The act shows no intent to make any such discriminations. Yet such discriminations are made if the tax mentioned in the 122d section, as well as that mentioned in the 123d, did not expire when the tax on other income expired.

I come now to the question—important to be considered in view of the pleadings in these cases—whether the tax mentioned in the 122d section was a tax upon the railroad companies, or a tax upon the stockholders and bondholders of those companies. In regard to this there ought to be no doubt. If it was a tax upon the railroad company, then the income of the stockholders and bondholders, derived from their dividends and interest, was exempt from all income tax, although the 116th section taxed income derived from any source, including interest and dividends. Such income was not to be returned to the assessor, and if not taxed in the mode designated in the 122d section, it was not taxed at all. To such an absurdity the construction that the section lays a tax upon the railroad company for its income inevitably leads.

But look now at the language of the section. It required any railroad company indebted for any money for which bonds or other evidence of indebtedness have been issued, bearing interest, payable one or more years after date, or any such company that should declare any dividend *as part* of the earnings, profits, or gains of such company, should be subject to, and pay a tax of 5 per centum on all such interest, dividends, or profits whenever and wherever the same should be payable, and to whatsoever party or person the same should be payable, *and authorized the companies to deduct and withhold from all payments on account of any interest or dividends*, due and payable as aforesaid, the tax of 5 per centum. It further enacted that the payment of the amount so deducted from the interest or dividends should discharge the company from that amount of the dividend, or interest, due to the stockholder or bondholder. It is too clear for argument that this was a collection of the tax from the stockholder, or creditor, and not from the company, and we have,

in effect, so decided in the *Case of the State Freight Tax.** Not a dollar was to be taken from the treasury of the company. The tax was to come wholly from the share, or the bondholder. The company was constituted the mere tax collector, and was made liable only in default of its duty as such. If authorities are needed in support of so plain a proposition, they may be found in *Jackson* v. *Railroad Company*, cited above, and in *Haight* v. *Railroad Company*,† both construing this act. Indeed, in some of the States this mode of collecting a tax from shareholders and bondholders of corporations has of late been frequently adopted, and, so far as I know, it has never before been thought that the tax in such cases was a tax upon the companies, instead of a tax upon their shareholders or creditors. As well might it be claimed that when a tax collector is charged with the amount of the duplicate of taxes he is empowered by his warrant to collect, the taxes are laid upon him, and not upon those from whom he is required to collect them.

But the opinion of the majority of my brethren, that by the 122d section Congress intended to tax the railroad companies for *their* gains, profits, and income, and not to tax their bondholders and shareholders, leads to a very remarkable result. The interest due from the companies to their creditors—interest which accrued in 1869—is treated as income of the *companies* for that year, and they are taxed for it. Such is the effect of the judgments entered. The companies are compelled to pay an income tax, not upon what they received, but upon what they were obliged to pay to their creditors. A construction of the act of Congress that leads to such a result cannot be right. It seems to me the fact that the tax was exacted out of interest payable by the companies, as well as from dividends declared and payable by them, demonstrates that Congress had in view, in the 122d section, not the income of the companies, nor a tax upon them for it, but the income of share and bondholders, and a tax upon them. Railroad companies were taxed upon

* 15 Wallace, 282. † 6 Id. 15.

their gains in another section, the 103d. They were not intended to be taxed in this.

Holding it, then, to be very clear that this section imposed no new tax, and that its design was merely to provide a mode of collection of a part of the income tax imposed by the 116th section upon the holders of the bonds and stock of railroad companies, the question is not, in my judgment, what the majority of the court considers it to be, whether the income upon which the tax in controversy in these cases was attempted to be levied was the income of the railroad companies for 1869, but whether it was the income of the stockholders and bondholders for that year. In two of the cases the dividends were declared in December, 1869, but were made payable in January, 1870. They were not, therefore, receivable until 1870. In all the other cases the dividends were declared, and the interest fell due in the year last mentioned. True, the dividends were out of profits made by the companies in 1869, and the interest on the debt due by them accrued in that year. But were the dividends and the interest income of the stockholders and bondholders then? Plainly, that which was the income of the companies in one year may not have been the income of their shareholders or creditors until the next. If it was not their income until 1870, it was not taxable against them, and the tax claimed in these cases is, as I have shown, a tax upon them. That nothing was income of the taxpayers until it was receivable by them is most apparent. The act itself sufficiently shows this. It was income "derived," or received, either actually, or potentially, that alone was made taxable. The tax was levied "*whenever*" and wherever the dividends or interest should become payable. The companies were required to render returns to the assessors, or assistant assessors, on the tenth day of the month following that in which the interest, coupons, or dividends became "*due and payable.*"* The tax was an excise. It was taking out of the income a part of it, and it must, therefore, have

* Vide, § 122.

been a tax upon something received, or receivable—something out of which the tax could be paid when exacted. And such was the uniform construction given to the act of Congress by the government, until after the tax had expired. Prior to the act of 1864 there was a tax on dividends of three per cent., and when by that act the rate was raised to five per cent. the Commissioner of Internal Revenue issued a circular, dated July 1st, 1864, declaring that "all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of 5 per centum." I have no doubt, therefore, that the dividends declared, and the interest accrued, must be regarded as income of the stockholders, or bondholders, for the year in which they became payable. It is quite immaterial, then, that the profits of the companies were made, or that the interest on their debt accrued, in 1869. They were not the taxpayers, and the tax was not levied upon their income. It was levied only upon that part of their gains, or the interest due from them, which had become payable to, and, therefore, income of their shareholders and bondholders. Those persons have paid taxes upon the full income of six entire years under the act of 1864. The judgments in these cases compel them to pay a tax upon their income for six years and a half, when all other persons whose income was derived from interest or dividends in other companies were relieved at the expiration of six years. In my judgment, the act of Congress warrants no such injustice.

I think the judgments in all the cases should be affirmed.

[See the next case, and note to it on pages 885, 886.]

UNITED STATES v. RAILROAD COMPANY.

The tax provided for in the 122d section of the Internal Revenue Act of June 30th, 1864, as subsequently amended, in which section it is enacted that railroad and certain other companies specified, "indebted for money for which bonds shall have been issued . . . upon which interest is stipulated to be paid . . . shall be subject to and pay a tax of 5 per centum on the amount of all such interest," . . . is a tax upon the creditor and not upon the corporation. The corporation is made use of but as a convenient means of collecting the tax.

A municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues.

ERROR to the Circuit Court for the District of Maryland.

This case arose upon the identical 122d section of the Internal Revenue Act of 1864, as amended by that of 1866, which is discussed in the preceding case. The section enacts:

"That any *railroad*, canal, turnpike, canal navigation, or slackwater *company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid*, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, *shall be subject to and pay a tax of 5 per centum on the amount of all such interest* or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens.

"*And said companies are hereby authorized to deduct and withhold from all payments on account of any interest* or coupons, and dividends, *due and payable as aforesaid, the tax of 5 per centum;* and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the

bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise."

This is the material part of the section. Another paragraph is, however, here presented, as it is spoken of in one of the opinions* in the preceding case, as assisting to interpret the parts that precede it.

"And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of $1000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

In the year 1854, and prior, of course, to the enactment of the said section, or indeed of any internal revenue statutes, the legislature of Maryland gave to the city of Baltimore (then desirous of aiding the Baltimore and Ohio Railroad Company in the construction of its road, which the city councils of Baltimore conceived would, if made, greatly benefit the city), authority to issue and sell its bonds to the extent of $5,000,000, payable in 1890; and to lend the proceeds to the railroad company, less 10 per cent., to be reserved as a sinking fund to pay the principal of the loan at its maturity. This the city did, the railroad company in

* *Supra*, p. 805.

turn giving to it a mortgage on all its road, revenue, and franchises, to secure the payment of the bonds which the city had issued, and the interest which it had bound itself to pay.

After the passage of the internal revenue laws, the 122d section of which is above quoted, the government claimed payment from the company of a tax of 5 per cent., which the collectors of the Federal revenue alleged that under the plain language of the above-quoted 122d section, the company was bound to withhold from the city and pay to the United States. The company refused so to pay the 5 per cent. to the government, on the ground that the tax was not a tax laid on *it*, the company, but one laid on their creditor, the city of Baltimore, and that that city, being a municipal corporation, could not have its revenues taxed by the Federal government.

The United States accordingly sued the company, in the court below, in assumpsit.

The first count alleged that the company, by force of the provisions of the mortgage, became bound to pay to the city the interest on the loan, and that the company owed for tax on such interest $87,000.

The second count was for $87,000, money had and received. The defendant pleaded the general issue.

The court below gave judgment for the company, and the United States brought the case here, where it was fully argued March 12th, 1873, by—

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the plaintiff in error; Messrs. J. H. B. Latrobe and I. N. Steele, contra.

And now, April 3d, 1873—

Mr. Justice HUNT delivered the opinion of the court.

The defendants insist, firstly, that the section in question does not lay a tax upon the corporations therein named, and by whom the tax is payable, upon their own account, but

uses them as a convenient means of collecting the tax from the creditor, or stockholder, upon whom the tax is really laid. They insist as a consequence, secondly, that the present is a tax upon the revenues of the city of Baltimore; and, thirdly, that it is not within the power of Congress to tax the income or property of a municipal corporation.

1. The case of *The Railroad Company* v. *Jackson*,* decided in 1868, and *Haight* v. *Railroad Company*,† are authorities in support of the first proposition. In the case first mentioned, Jackson, an alien non-resident, sought to recover from the railroad company the amount of the tax of 5 per cent. imposed upon the interest of bondholders by the act of 1864, and withheld by the company. A similar tax was imposed by the statutes of Pennsylvania. The plaintiff claimed that as he was an alien non-resident, it was not in the power of Congress, or of that State, to tax him. The courts of Pennsylvania had sustained the deduction. Mr. Justice Nelson, in delivering the opinion of this court, and in remarking upon the decision of those courts, "that the deduction from the prescribed income of the interest on these railroad bonds, when paid by companies, was regarded as simply a mode of collecting this part of the income tax," says: "We concur in this view. It is not important, however, to pursue this argument, as Congress has since, in express terms, by the acts of March 10th and July 13th, 1866, imposed a tax on alien non-resident bondholders. The question will be hereafter not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it." In *Haight* v. *Railroad Company* it was held that a covenant by the corporation issuing the bond to pay the interest "without any deduction to be made for or in respect of any taxes, charges, or assessments," did not relieve Haight, who was a bondholder, from the deduction of the 5 per cent. authorized by the 122d section. The court below said that "the measure of the company's liability is expressed in the bond as being debt and interest only. It has nothing to do

* 7 Wallace, 262.

† 6 Id. 17.

with the taxes which the government may impose on the plaintiff for the interest payable to him. . . . The plaintiff pays no internal revenue tax on these bonds at his place of residence. It is, therefore, no case of double taxation. The tax should be paid somewhere, and it was to meet investments like this, in banks, railroads, &c., that the 122d section was passed." This opinion was adopted in this court, Mr. Justice Grier saying: "The facts in this case are correctly stated, and the law properly decided by the learned judge of the Circuit Court."

This is a clear, distinct, unqualified adjudication, by the unanimous judgment of this court, that the tax imposed by the 122d section is a tax imposed upon the creditor or stockholder therein named; that the tax is not upon the corporation, and that the corporation is made use of as a convenient and effective instrument for collecting the same. It is a sequence in logical connection with that provision of section 117,* which specifies as the subjects of individual taxation all the earnings, profits, gains, and income from whatever source derived, and whether divided or not, *except* the amount derived from the sources indicated in the 122d section. Of the incomes specified in section 117 the individual must make specific returns, and be directly taxed thereon. Upon or for the incomes received from the sources mentioned in section 122 no tax is directly imposed upon the owner. That tax is to be returned by, and collected from, the corporation as his agent and instrument.

A tax is understood to be a charge, a pecuniary burden, for the support of government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.

In the cases we are considering the corporation parts not with a farthing of its own property. Whatever sum it pays

* See this section quoted *supra*, p. 295.

to the government is the property of another. Whether the tax is 5 per cent. on the dividend or interest, or whether it be 50 per cent., the corporation is neither richer nor poorer. Whatever it thus pays to the government, it by law withholds from the creditor. If no tax exists, it pays 7 per cent., or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax it pays exactly the same sum to its creditor, less 5 per cent. thereof, and this 5 per cent. it pays to the government. The receivers may be two, or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed.

In the case before us this question controls its decision. If the tax were upon the railroad, there is no defence. It must be paid. But we hold that the tax imposed by the 122d section is in substance and in law a tax upon the income of the creditor or stockholder, and not a tax upon the corporation.

The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is per-

mitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

In the "Compendium of Internal Revenue Law," by Davidge & Kimball, it is said,* "Congress may not tax the revenues of a State,"† and also, "A national bank is not liable under the internal revenue laws to the tax upon dividends due a State on stock owned by the State."

Again:‡ "The term corporation as used in the acts of Congress touching internal revenue does not include a State, consequently the income of the State of Georgia from the Western and Atlantic railroad, property owned, controlled, and managed by that State, has not been made by law a subject of taxation."

Again, "The term person as used in §§ 9 and 44 does not include a State. The receipts or certificates issued by the State of Alabama are not subject to the tax of 10 per cent. imposed by the act of Congress of March 25th, 1867."§

The inquiry then arises, what is the nature and character of municipal corporations, and what is their connection with the government of the State.

A work on corporations says,‖ that inferior and subordinate communities, *imperia in imperio*, such as cities and towns, . . . are allowed to assume to themselves some of the duties of the State in a partial or detailed form, but having neither property nor power for the purposes of personal aggrandizement, they can be considered in no other light than as auxiliaries of the government, and as the secondary deputies and trustees and servants of the people.¶

It is said further by the same authority, the main distinction between public and private corporations is, that over the former the legislature, as guardian of the public inter-

* Page 505; citing Sayles *v.* Davis, 22 Wisconsin, 229.

† Page 485; citing 12 Opinions of the Attorneys-General, 402.

‡ Page 471; citing State of Georgia *v.* Atkins, Collector, 8 Internal Revenue Record, 113.

§ 12 Opinions of the Attorneys-General, 176.

‖ Angel & Ames on Corporations, § 16 *et seq.*

¶ 2 Kent, 4th ed. 274, and De Tocqueville Democratie, 1, 64, 96.

ests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. It possesses the right to alter, abolish, or destroy all such institutions, as mere municipal regulations must, from the nature of things, be subject to the absolute control of the government.* "Such institutions (it is added) are auxiliaries of the government in the important business of municipal rule."

A municipal corporation like the city of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation. This proposition is very properly admitted by the counsel for the government. In their brief it is said, "We admit that municipal corporations, acting merely within the scope of their duties as such, are not to be included within general words imposing taxes upon persons or corporations." In support of this view is cited the proviso to the amendment in 1866, in these words: "Provided that it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

Assuming for the argument that this qualification is well made, let us look at the facts of the case before us. The city of Baltimore, with a view to its commercial prosperity, was desirous of aiding in the construction of a railroad, by

* Angel & Ames on Corporations, § 31.

which the commerce and business of the Western States would be brought to that city. For this purpose it was authorized by the legislature to issue its corporate bonds for $5,000,000, on which it was to obtain the money. The proceeds of these bonds, reserving 10 per cent. as a sinking fund, were to be paid to the railroad company. To secure the city against loss and to provide for the payment of the interest on the bonds of the city as it should, from time to time mature, and of the principal when payable, the railroad company were to execute a mortgage to the city upon its road and franchises and revenues. All this was done as agreed upon. The interest, secured by this mortgage, has, from time to time, been paid by the railroad company to the city, and it is a tax (under the 122d section before referred to) upon the interest thus paid, that the plaintiff now seeks to recover.

That the State possessed the power to confer this authority upon the city, we see no reason to doubt.*

Was it exercised for the benefit of the municipality, that is in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the city of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the city of Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that city the unbounded harvests of the West, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position?

* Gelpcke v. Dubuque, 1 Wallace, 202; Rogers v. Burlington, 3 Id. 664.

This was a question for the decision of the city under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The city had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the city to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the city. It might be wise, or it might prove otherwise. The city was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the city was to bear the load of debt and taxation, which would surely follow. The city had the power given it by the legislature to decide the question. It was within the scope of its municipal powers.

This advance of the city bonds was not a donation. It was an investment supposed to be judiciously made and adequately secured. It was not for the individual benefit of those managing the business. No one received advantage except as he was a citizen or his property was within the city. It was not a loan for the benefit of the railroad; it was for the benefit of the city solely. That the railroad company was also benefited did not affect the purpose of the transaction.

It is said by the counsel for the United States that municipal corporations are those that are created irrespective of those who are associated therein, and that the powers are given and withheld upon grounds which concern the public at large. It is not necessary to discuss the question whether this city is a municipal corporation. If there can exist a municipal corporation, as that expression is generally understood, the cities of this country, like Baltimore, Philadelphia, and New York, fall within the definition. The power in question was conferred because its exercise concerned the public and to benefit that public. This power could no doubt have been imposed upon the city as a duty, and its

exercise directed without the assent or against the wish of the corporation or its citizens. The State could do it directly for and on behalf of the city, and without its intervention. The city could act only by authority from the State. The State is itself supreme, and needs no assent or authority from the city. It is not perceived that the act is less public and municipal in its character than if the State had compelled the city to lay the tax and to make the appropriation of the proceeds to the railroad company. In *The Town of Guilford* v. *The Board of Supervisors of Chenango County*,* it was held:

1. That the legislature has power to levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town.

2. That it is not a valid objection to the exercise of such power, that the claim to satisfy which the tax is levied is not recoverable by action against the town.

3. That it does not alter the case that the claim has been rejected by the voters of the town, when submitted to them at a town meeting, under an act of the legislature authorizing such submission and declaring that their decision should be final and conclusive.

The action is no less a portion of the sovereign authority, when it is done through the agency of a town or city corporation.

We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action

* 3 Kernan, 143.

be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY:

I concur in the judgment of the court in this case, without deciding whether Congress can or cannot tax the property of municipal corporations. I concur in the judgment on the ground that Congress did not intend by the internal revenue laws to tax property belonging to the States or to municipal corporations. This is apparent from the language of the 116th section of the Internal Revenue Act of 1864. I also concur in the construction given by the opinion to the Internal Revenue Act, that the tax imposed by the 122d section of that act was substantially a tax on the stock and bondholders, and not on the railroad or canal companies.

Mr. Justice CLIFFORD (with whose dissent and views concurred Mr. Justice MILLER), dissenting:

I dissent from the opinion and judgment of the court.

Property owned by a municipal corporation and used as means or instruments for conducting the public affairs of the municipality may not be subject to Federal taxation, as it may perhaps be regarded as falling within the implied exemption established by a recent decision of this court.*

Well-founded doubts, however, may arise even upon that subject, as the tax in that case was levied directly upon the salary of a judicial officer, and the opinion of the court is carefully limited to the case then before the court. But concede, for the sake of the argument, that the means and instruments for conducting the public affairs of the munici-

* The Collector v. Day, 11 Wallace, 113.

pality are entitled to the same exemption from such taxation as the revenues of the State, it by no means follows that the private property owned by such a corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains, and profits, is not taxable just the same as property owned by an individual, or any other corporation. Such a right is one which may be of great value to the government in time of war and imminent public danger, and one which the United States ought never to surrender.

Corporations of the kind are very numerous and they may and often do own large amounts of bank stock, bonds, and stocks of railroads, vacant lots and other real estate of great value, and many other species of personal property and choses in action never used or intended to be used as means or instruments for conducting the public affairs of the municipality, and in respect to all such property the right of Congress to pass laws subjecting the same to taxation with the property of the citizens generally is as clear, in my judgment, as it is that the power to lay and collect taxes, duties, imposts, and excises is vested by the Constitution in the national legislature.*

It was decided by this court, in the case of *Vidal* v. *Girard's Executors*,† that the corporation of the city of Philadelphia had the power under its charter to take real and personal estate by deed and also by devise, inasmuch as the English statute which excepted corporations from taking such properties in the former mode was not in force in that State; that where a corporation has this power it may take and hold property in trust in the same manner and to the same extent as a private person may do, even though the trust is not strictly within the scope of the direct purposes of the charter of the municipality.

Ten years later this court affirmed that same rule in the

* McCulloch v. Maryland, 4 Wheaton, 434; Louisville v. Commonwealth, 1 Duvall, 295; National Bank v. Commonwealth, 9 Wallace, 353; Veazie Bank v. Fenno, 8 Id. 533.

† 2 Howard, 127.

case of *The Executors of McDonogh* v. *Murdoch** which gave three millions of dollars to the city of Baltimore and more than a half-million of dollars to the city of New Orleans. Both of those corporations, it was held in that case, were empowered to take the property by devise, as the laws of the respective States do not prohibit such dispositions of property in their favor, affirming the principle that such corporations may take real and personal estate by deed or devise, and that they hold such property in trust in the same manner and to the same extent as private persons, and the statistics will show that such corporations have become the grantees or devisees of vast amounts of personal and real estate, and that many of them still hold and enjoy the same for the income, rents, and profits.

Apply the rule here suggested to the case before the court and it is clear, whether it be held that the tax was levied upon the municipal corporation or the railroad company, that the judgment should be reversed.

NOTE.

Soon after the opinion of the court in the preceding case was delivered, a motion was made by Messrs. *Gowen*, *Biddle*, *and Cuyler*, the counsel of the different railroad companies, in the case of *Barnes* v. *Railroad Companies*, decided five weeks before it, for a rehearing of that case; the grounds of the motion being the obvious and irreconcilable contradiction between the language in one of the opinions given in the first case (see *supra*, pp. 302–3, 309), which opinion the learned counsel assumed to be the opinion of the court—and the opinion of the court in the second case (see *supra*, pp. 326–7); a contradiction which the counsel exhibited by a juxtaposition of passages in the two opinions.

And now, April 28th, 1873, the Chief Justice announced the order of the court

DENYING THE MOTION.†

---

* 15 Howard, 367.

† No reasons were assigned for the order. The reader will have perceived, probably, that notwithstanding the inconsistency of language in the

HUME v. BEALE'S EXECUTRIX.

1. Although a former suit about the same subject-matter as a later one may not operate strictly as *res adjudicata*, yet it may well be referred to when it was heard on the scene of the transaction complained of, and when it relates to a transaction forty years old, as an element by which a conclusion at a later day in accordance with its result may be assisted.
2. The rule of equity applied, that if a *cestui que trust*, after becoming *sui juris*, has with full knowledge of a breach of trust, for a long time acquiesced in it, equity will not relieve him.
3. Accordingly, a bill by *cestui que trusts* was dismissed, where all the grounds of action had occurred between twenty and thirty years, and the alleged breach of trust had taken place thirty-seven years before the bill was filed, and the trustee was dead.
4. This, although the *cestui que trusts* were women and the trustee a lawyer, who had married their half-sister.

ERROR to the Supreme Court for the District of Columbia; the case being thus:

Benjamin Berry, of Prince George's County, Maryland, owning a farm in that county, about twenty miles from Washington City, stocked with thirty slaves, and with proper animals and implements of husbandry, on which farm his son and the wife Eleanor of this son, with their three children, named respectively, Barbara, Amanda, and Rosalie, were living, conveyed it in March, 1826 (his said son having then recently died), to Robert Beale (a young lawyer of Washington City, a friend of the family, and who in 1829 married a daughter of the said Mrs. Eleanor Berry, by a former husband) on these trusts "*and no other*;" that is to say, "*to retain the legal title* to all the said property during the life and widowhood of the said Eleanor, and after her death or marriage, until such time as the eldest of the children shall

---

opinion relied on by counsel in the former case, with that expressing the opinion of the court in the latter, the *judgments of the court* in the two cases are in no way inharmonious. And the Reporter has already noted in his syllabus of the former case that the judgment in it was given by a court nearly equally divided, and that the majority of the court who agreed in the judgment did not agree in the grounds of it.

come of age or be married, on which event or events the said Robert shall convey the unconditional title in fee to all the property, both real and personal, unto the said children and their heirs, or such of them as may be living at the time of such conveyance, and to the issue of any such as may be dead, &c. . . . And the said Robert shall permit the said Eleanor to have and enjoy the sole and exclusive use of all the said property for and during the time in which she shall and may live and remain unmarried, without molestation or hindrance of him, the said Robert, or said Benjamin, or any other person or persons whatsoever."

On the 18th of December, 1827, Benjamin Berry, the grantor, died.

In the autumn of 1828 Mrs. Eleanor Berry took up her residence in Washington City, and there became acquainted with, and, as was rumored, was married (secretly, in order to avoid a forfeiture of her life estate), to a certain Col. Owings. While on the farm, according to the testimony, she "lived finely, and entertained a great deal." Her course of life in Washington also was expensive. She had very little property of her own, and that not in money.

In the years 1828 and 1829, that is, after the death of Mr. Berry, the grantor, and before the year 1830, nearly all the slaves had disappeared from the farm; the slaves were "not sold in a body but picked off one or two at a time; that is, sent to a place where the traders could get them; locked up there till the traders came."

Most of the farm stock had equally disappeared.

Early in 1830 Beale filed a bill against Mrs. Berry in the High Court of Chancery of Maryland to prevent her from further disposing of the personal property. And immediately thereafter, in 1830, under or in consequence of some order of court, took possession of the land and what remained of the personal property.

In the summer of 1830 Mrs. Berry left her house in Washington City, and never returned to it; "went off travelling," said a witness in the case, "where, I do not know."

In December, 1830, the three children, by their uncle as

next friend (he residing on an adjoining estate), filed a bill in the County Court of Prince George's County, Maryland, against Beale, Mrs. Berry, and Owings (to whom the bill alleged that she was married), setting forth the sale of all the personal property and waste of the proceeds, and praying the removal of Beale as trustee, an account, and the appointment of a receiver. Mrs. Berry was not served with process, being off travelling. A receiver was appointed and gave bond. Beale appeared and answered. He admitted in his answer that Mrs. Berry, who, he asserted, had been rightfully in possession and control of the property, had, without his knowledge or authority, greatly impaired and injured the value of the trust estate; and alleged that finding all other means ineffectual to prevent her further disposing of the property, he had appealed for protection to the High Court of Chancery of Maryland, which was granted, and that he had abandoned his residence in Washington at great personal sacrifice, and was living on the farm for the purpose of taking care of it and what remained of the personal property. He denied that he was in anywise remiss or negligent of his duties as trustee, or that he had anything to do with the sale of the negroes or other personalty. The cause was regularly heard, and a decree made dismissing the bill.

In February, 1833, the daughter Barbara married Mr. Hume.

In 1834 the trust property was sold under a decree of the court; the share of each of the three daughters being $3000. The share of the youngest daughter, Miss Rosalie, was left in the hands of Beale, who was intrusted by the said Miss Rosalie with the management of it. This money was paid, after Miss Rosalie's death, to her administratrix and sister, Mrs. Hume.

In 1839, Mrs. Hume attained the age of 21 years.

In September, 1842, Mr. Hume died.

In 1843, Mrs. Eleanor Berry was married to one Ferguson.

In November, 1844, Amanda married Mr. Crosby.

Statement of the case.

In January, 1857, Mrs. Eleanor Ferguson (Berry) died.

In September, 1857, Mr. Crosby died.

In May, 1860, Miss Rosalie Berry died unmarried; her sister, Mrs. Hume, becoming her administratrix.

In November, 1866, Mr. Beale, the trustee, died, leaving his daughter executrix of his estate.

In April, 1867, the surviving daughters, Mrs. Hume and Mrs. Crosby (their husbands being now dead), filed a bill in the court below against this executrix of Beale, alleging that he had sold and converted to his own use a considerable portion of the personal property, the proceeds of which he had used very advantageously to himself, and had suffered Mrs. Berry, the widow, to squander the rest. The bill giving as an excuse for not instituting proceedings sooner, that Beale had from time to time put the complainants off with promises of settlement; that having married their half-sister, "he took advantage of that relationship to abuse the confidence which the relationship naturally inspired, and to turn the same to his own pecuniary interest and advantage."

The answer denied the breach of trust, and while alleging that the transactions narrated in the bill, so far as they were founded in truth, occurred nearly forty years before, and before the respondent was born, and consequently that she could have no personal knowledge of the circumstances, yet set forth a narrative of facts which tended to show that the waste of the property was committed solely by Mrs. Berry, and that Beale had used his efforts to prevent it, and did finally arrest it, but not until most of the personal property had been made away with. It stated that the farm, and what trust property remained, had prior to 1834 been sold by order of the court, by trustees duly appointed, and the proceeds distributed. It denied that Beale ever made the admissions, promises, and excuses alleged in the bill, or that the complainants ever asserted against him in his lifetime the claim now made or any claim; and asserted contrariwise that the complainants had received all that they were entitled to, and that their husbands had used what money they

had, and left them, in widowhood, dependent on their relatives.

The answer set up also certain special defences as—

The suit against Beale in the County Court of Prince George's County.

The statute of limitation [three years in the District], and independently of it the laches and lapse of time.

The testimony chiefly relied on by the complainants was that of Mrs. Hume, one of the complainants; of a white witness named Douglass, of another, named Brashears, and of two old colored servants, Johnson and Brooks, who had been on the farm.

The testimony of Mrs. Hume was received under the act of Congress of July 2d, 1864,* which enacts that

"In courts of the United States there shall be no exclusion of any witness . . . in civil actions, because he is a party to or interested in the issue joined;"

no objection having been raised to it, so far as appeared by the record, under the act of March 3d, 1865,† amendatory to the said act, which amendatory act provides—

"That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify by the opposite party."

Mrs. Hume testified as follows:

"After my grandfather Berry's death, in 1827, the property commenced to go. It went by degrees. From 1828 to the summer of 1830 everything was spent except some old negroes. They were sold by my mother and Mr. Beale. The real estate was sold by commissioners appointed by the court. My husband received my portion in person. Mr. Beale paid me my sister's portion in driblets. He never paid me anything else. I called upon him repeatedly to settle his trusteeship. Three or four years before his death, 'most every time I saw him, I

* 15 Stat. at Large, 351. † Ib. 583.

asked him for a settlement, and told him my inability to live. I told him my situation, and told him it was very destitute. These conversations occurred almost every time I saw him. I told him almost every week, when I saw him, that it was high time to make a settlement. He did not give me any money, and he never made any settlement. He made a great many promises, and that is all. The reason I never instituted this suit before was he made so many promises from time to time that he would settle. He never made me any payments at all outside of the $3000 which he received as my share of the proceeds of the farm. At the conversations I have spoken of, about a settlement, no one was present but ourselves. He never talked before third persons unless they were interested. I occasionally wrote to Mr. Beale, and he answered my letters. In his letters he never spoke anything of the wasted property. I never wrote to him about any of it, except some servants that Otho Beale bought, and Mr. Beale (for me) brought suit to recover them. I always thought that Mr. Beale got part of the money that the personal estate sold for. My husband thought Mr. Beale had done very wrong. He was himself a lawyer. He spoke to me in his lifetime, in 1834 or 1835, of bringing a suit, and asked me to join him. I told him it was of no use, as Mr. Beale was poor and we could make nothing out of him at that time.

"I never was present when any negroes were sold. I never saw any money paid by the traders for them. My mother had some negroes which came by her mother's (Mrs. Lane's) estate. Mrs. Lane was rich. They came to her before her marriage with my father, Mr. Berry, Jr. They were made over to my half-brother and to Mrs. Beale, my half-sister."

Douglass, who testified that he had owed some money to Mr. Beale, said:

"Mr. Beale was pressing me for the money. He said that he owed these ladies (half-sisters of his wife) some money, and that he wanted the money for them. These conversations ran through a number of years, to the day that I settled with him. He said that he wanted $5000. I do not remember that he mentioned real estate to me. He told me that the way he became indebted to the ladies was that he had charge of their money, and had borrowed it. He said that he must raise the

money from me or sell his house to raise it. In speaking of these ladies, I think he mentioned one of them as Berry: he simply used the name of Berry."

Brashears testified only that he lived on an adjoining farm and knew Beale; that when Beale was appointed trustee, he was regarded as poor, and that he afterwards owned a house in which he lived; that he thought Beale had exercised control over the farm from the time he was married; and that "the property on it was pretty generally on the travel from the time Mrs. Berry moved to Washington till it was all sold."

One of the old slaves, Brooks, testified thus:

"Mr. Beale had no property, before he was married, but a house. After the deed of trust was given and Mr. Beale got the property in his own hands he was like the green bay tree by the river of water. He spread out—he got everything he wanted. He had control as a master over everything; to sell or not to sell, as he pleased If he chose to do anything, Mrs. Berry could not stop him. I never saw him do anything, because I was not present, but I know he disposed of all the property. I never saw him take away any of the property; I *mean*, saw him sell any, and I never saw him receive any money for it. The only way that I know he sold the slaves was that I missed them, and as they could not be sold by law without his consent, I believe he sold them. I know it must have been done by his consent, because nobody else could have done it. He was the guardian of the children. Before Mrs. Berry moved to Washington, she lived in very handsome style and had plenty of everything. She was rich."

The other negro, Johnson, testified:

"As far as I know, Mrs. Berry and Mr. Beale were hand-in-glove, and between them they sold the colored people; somewhere in the neighborhood of thirty-five; not one was left to tell the tale. Mr Beale would come down from Washington once or twice a week. I don't know who received any of the money for the negroes. I have seen the negro-traders there often. Mr. Beale would bring them down there from the city, and have the negroes hiding about like young rabbits. And I

have often heard the servants say that they thought *Mr. Beale ought to interfere and protect the children.* I never knew him to interfere to prevent them being sold. He only told me that he would see that I was not sold to Georgia. My wife belonged to him. She came from old Mrs. Lane. I never saw Mr. Beale have any possession of any of the servants, except when any of them were to be sold, when, of course, he always had a hand in it. There were only two old men and two old women, three or four house servants, and myself left on the farm after Mrs. Berry came to Washington. I flew the track; they sold me running. I think one of the old ones that were left was afterwards sold to a brother of old Mr. Berry. Mrs. Eleanor Berry had no property when she married young Mr. Berry. His father gave him the farm, and stock, and servants, and let him have it to make what he could, but gave him no title to it, or any of it, *because his wife had the reputation of being an extravagant woman, and he was fearful that the children might come to want.*"

Certain letters were introduced by the defendants from Mrs. Hume to Mr. Beale, by way of discrediting her testimony. They were of a very confidential kind. Parts of them were thus:

"NASHVILLE, December 1st, 1837.

"DEAR MR. BEALE: You will oblige me very much, if you can spare the time, to go to Marlboro' this court, for the purpose of getting the money, or a part of it, that is due me. I am very much in want at this time. I would not trouble you, but necessity is the first law of nature; therefore I was compelled to address you. My circumstances are such that I cannot do without a little money. Mr. Hume is out of employment entirely; dissipated and too indolent to exert himself for a support. We are all living with his mother; she is not able to keep us, and can hardly get along with her own family. I cannot stay here. I am a stranger here, no one to aid me in the most trifling matter. If I was where I was known I could get along somehow or other. I should like to be with my relations. I think Otho Beale would help me if he knew my situation. I should like to get in a school as an assistant teacher, so as I could be making a living for myself and children. I would exert myself to the utmost to get along. I have said enough of this matter for you

to judge of my situation. . . . I wish I had never have left the city, and have taken your good advice. I cannot say any more. You can see what my feelings are. Do answer this, and please to attend to the request I have made of you about getting the money. Give my best love to sister and brother, and accept a great share of love from

"Your true friend,
"BARBARA."

"June 5th, 1846.

"R. BEALE, ESQ.: Your note has been received in which you refuse to see me again, and, strange to say, you have charged me with falsehood, duplicity, and treachery. What crime have I committed that you should apply such epithets to my name? Thank God, I have an approving conscience; one that can say I have never, my dear brother, wronged you in thought or word. I always spoke of you in the most affectionate manner. I admit I have been in error, but am ready to make reparation. Don't judge me so harshly. You have wronged me. Forgive the innocent. I truly repeat, my dear brother, speak kindly to me, and don't cast me on the cold world without a cent. I will go to Baltimore; stay there in retirement. Time will show you that I am not what you consider me. I will not stay here longer. . . . Soon a lonely grave will be the only mark that I shall leave behind me. I wish to see you once more. I shall be then better satisfied. Don't refuse me this small favor. No money or friends! Heaven's support in this hour of affliction is all I pray for.

"B."

It appeared that the husbands of both Mrs. Hume and Mrs. Crosby (the daughters Barbara and Amanda) were improvident men, who always wanted money.

The court below being equally divided in opinion the bill was dismissed, and the complainants took this appeal.

Messrs. Moore and Hughes, for the appellants, the complainants below:

The claim of the complainants is not barred by the lapse of time or the statute of limitations. The trust is an *express*

trust. The trustee was the brother-in-law of the complainants, and when he took possession of their property they were of tender years. It is not pretended that any settlement of Beale's trusteeship was ever made. No account was ever rendered to the court, or anywhere else, by Beale. A large amount of personal property came to his hands. The deed of trust vested the legal title to all of the property in him, and Mrs. Berry had nothing but the *use* under said deed. That Beale profited by it is shown by the testimony of Mrs. Hume, and of Johnson and Brooks, old family servants. That he acknowledged his obligation, and promised to pay, is shown by the testimony of Mrs. Hume and of Douglass. The case is one where two dependent females, sisters-in-law to the trustee, looked to him, leaned upon him, and trusted him to take care of the estate which had been left them by their grandfather. They, of course, were reluctant to believe that their brother-in-law would wrong them, and his repeated promises doubtless kept them from calling him to a settlement in court long ago.

Under such a state of facts, neither the lapse of time nor statute of limitations can avail. The principle settled by this court in *Michoud* v. *Girod*,* rules the case. In that case the court, speaking of the acquiescence of parties like the complainants here, say:

"We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scenes of the transactions of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers with whom they had been associated in a common interest by another brother who was dead. In a case of actual fraud courts of equity give relief after a long lapse of time, much longer than has passed since the executors in this instance purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved length of time ought not to exclude relief."

* 4 Howard, 197.

Argument for the trustee's executrix.

Messrs. J. M. Carlisle and J. D. McPherson, contra, argued:

That the complainants were estopped in the proceeding in the County Court of Prince George's County in December, 1830.

That Beale was trustee of a mere dry legal estate, and that the duties of such trustees are confined to three objects: 1st. To permit the *cestui que trust* to enjoy the estate; 2d. To execute conveyances when necessary; "3d. To defend the title of *cestui que trust* in any court of law or equity, or at any rate to suffer his name to be used for that purpose."* "It is not his duty to bring suits, but only to allow his name to be used, and this not until security has been given by the *cestui que trust* for costs."†

That it could never have been contemplated that Mr. Beale, a young lawyer in Washington City, should act the part of a slave-master and overseer of a farm, twenty miles off.

That so far as evidence of Mr. Beale's misconduct as trustee came from Mrs. Hume, one of the complainants, it should be disregarded as having been received in violation of the act of Congress of March 3d, 1865; while so far as it came from the old slaves, Johnson and Brooks, who naturally wished to testify in favor of their young mistress, it was destroyed by the very witnesses themselves; and that if Mr. Beale ever did bring slave-traders to the farm to buy slaves, it was doubtless to buy his own wife's slaves; those that came from Mrs. Lane, her grandmother, and were on the farm, but were not among those conveyed by old Mr. Berry.

That there was no evidence that Beale ever grew rich, beyond owning a house in which he lived; while it was shown that his wife had some property.

That the testimony of Douglass was sought to be perverted. Consider that testimony. If Mr. Beale was speaking of what he owed Mrs. Hume and Mrs. Crosby, in their own right, he would have used their names, and not have used the name of Berry, which they had laid aside years before;

* Hill on Trustees, 316–17. † Ib.

he would have had no occasion to speak of owing any one named Berry at all. Mr. Beale, "said he had charge of their money, and borrowed it." That was the way in which he owed Miss Rosalie, and that certainly was *not* the way in which he owed the complainants. If he owed *them* anything, it was because he had fraudulently sold their slaves, and not because he had borrowed their money.

That the laches were gross; the lapse of time in connection with the death of the party charged with mal-administration, conclusive. In *Prevost* v. *Gratz*,* this court says:

"Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

Mr. Justice DAVIS delivered the opinion of the court.

It is undeniable that the waste and misappropriation of property for which relief is sought, occurred prior to 1830.

This is apparent, not only by the testimony of the living witnesses, but by the papers in the suit commenced in the County Court of Prince George's County, Maryland, where the property was situated, in behalf of the children, for whom Benjamin Berry, in his deed, made provision, by their uncle and next friend, for the same cause of action as that comprised in the present suit.

While it is not necessary for the purposes of this case to decide whether this decree can be treated as a former adjudication of the matters in controversy, yet it is quite clear that forty years ago a Maryland court of equity, sitting on the spot where the transactions occurred, while they were fresh in the memory of men, did not believe Beale guilty of the breach of trust with which he was charged, and that the near kindred of the complainants acquiesced in the result of that suit.

* 6 Wheaton, 481, 498; and see Pratt v. Vatier, 9 Peters, 416; and Knight v. Taylor, 1 Howard, 161, 168.

Whether Beale, under the deed of Benjamin Berry, was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further, it is not important to determine. In any aspect of the case, there has been such gross laches on the part of the *cestui que trusts* that they have disentitled themselves to the relief which they seek to obtain. It is an established rule with courts of equity, independent of any statute limiting the time in which suits can be brought, that they will not entertain stale demands. This rule is necessary from considerations of public policy, and because it is impossible to do entire justice when the transactions sought to be impeached have become obscure by lapse of time, and the evidence on the subject is liable to be lost. Story, referring to the rule imposing diligence upon parties seeking relief, says: "Hence, if there be a clear breach of trust by a trustee; yet, if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose."*

This rule, requiring the party injured to seek redress in reasonable time, has so often received the sanction of courts of equity in this country and England, that it is unnecessary to cite authorities to sustain it. Whether the lapse of time is sufficient to bar a recovery must, of necessity, depend upon the particular circumstances of each case.†

By the terms of the deed in this case, the interest of Mrs. Berry in the property terminated on her marriage or death, and if the eldest child was of age or married, on the happening of either of these events the entire trust ceased, and the trustee was directed to convey the estate, real and personal, to the children and their heirs. It is alleged that Mrs. Berry was married to Owings in 1830. If this were so, it would account for her conduct in converting the personal property to her use, but the evidence on the subject of this

* Equity Jurisprudence, § 1284.

† Harwood v. Railroad Co., *supra*, 78.

marriage, although rendering it highly probable that it did occur, is insufficient to establish it.

It is conceded, however, that she was married to Ferguson in 1843, at which time the eldest child was not only of full age, but had been married and was then a widow. These occurrences, according to the terms of the deed, terminated the trust, but in point of fact it was terminated in 1834 or 1836, when the real estate was sold by order of the Prince George's County Court. This sale is set up in the answer, and Mrs. Hume testifies that the farm was sold by commissioners appointed by the court, and that her husband, in 1836, received from them in person, her share of the proceeds. It is in evidence that Mrs. Crosby was married in 1844, and she must have arrived at full age before that time.

It thus appears that all grounds of action, existing in this case, must have occurred between twenty and thirty years ago, and that the alleged breach of trust for which the estate of Beale is asked to account took place thirty-seven years before the institution of this suit.

Why have these complainants slept upon their rights for this great length of time, and why have they delayed invoking the aid of a court of equity until the person charged with misconduct is dead? It is plain this unusual delay places them on the defensive, and requires satisfactory explanation before they can obtain relief.

It is alleged in the bill as an excuse for not suing earlier that Beale put the complainants off from time to time with promises to settle his trusteeship, and did not deny that he was largely indebted to them on that account. This allegation receives support only in the testimony of Mrs. Hume, who had no right to testify as to any conversation or transaction with the decedent unless the opposite party or the court wished her to do it.* This rule of exclusion was imposed by Congress in the interest of dead men's estates, but as the record does not disclose any objection to the competency of the witness her testimony will be treated as if right-

* 16 Stat. at Large, 588.

fully given. She says, in general terms, that she called on Beale repeatedly to settle, and that he promised to do so, and that these promises induced her not to sue him. This is the extent of her testimony on the subject, and her statement is so general and so obviously necessary to avoid the bar of the statute of limitations and of lapse of time, which were pleaded, that it carries little weight with it. It would never do to hold that a stale demand of such long standing could have vitality imparted to it, on the mere statement of a party in interest that the decedent promised to settle. There must be some corroborating circumstances to call into activity the powers of a court of equity, and these are wholly wanting in this case. No one was ever present at any of these conversations, and there is no specification of time or place, nor does she say that Beale ever admitted any indebtedness on account of this trust. Besides, she never wrote to him, nor did he ever write to her on the subject, which is a little remarkable, considering her destitute situation from 1837 to the commencement of this suit. Indeed, the letters which she did write to him in 1837 and 1846 are inconsistent with the idea that she thought he intended to defraud her, which she now says she always entertained.

There is nothing in the record except this testimony that tends even to show that Beale ever admitted he was chargeable for the wrongful conversion of the property in question. He expressly disclaims this liability in the Maryland suit in 1830, and the court could not have rendered the decree it did without being satisfied at least that he was not personally concerned in the waste of the property. It is hard to believe, on the unsupported testimony of a party in interest, that Beale at different times during a long life confessed a liability which he repudiated on the occasion of that litigation.

It is a little singular that Beale should have confined his promises to Mrs. Hume, and not extended them to Mrs. Crosby. Mrs. Crosby does not testify, and we do not learn that either herself or husband, with whom she lived for thirteen years, ever manifested disapprobation of Beale's con-

duct. If the other sister, Rosalie, who died unmarried in 1860, considered Beale had wronged her, she would not have intrusted him, as she did, with the management of her share of the money received from the sale of the farm.

There is one other point in connection with the testimony of Mrs. Hume worthy of comment. She swears that, in 1834 or 1835, she advised her husband against suing Beale, for the reason that he was poor and nothing could be made out of him, and that her husband used to lend Beale money and supersede his debts for him. If this be so, the theory on which this case is prosecuted falls to the ground, for the whole effort is to show that Beale got so rich immediately after the conversion of the personal estate that he must have shared the proceeds. It is argued that the conversations which Beale had with Douglass refer to the obligations arising from his breach of trust, and that, therefore, Mrs. Hume is sustained by the testimony of Douglass. But manifestly Beale is not talking on this subject; he is talking about the sum of $3000 which Miss Rosalie Berry got from the sale of the farm and placed in his hands to loan. This money he owed the estate of Miss Berry, and was desirous of paying to her next of kin, Mrs. Hume and Mrs. Crosby.

It is needless to pursue the subject further. If Beale was guilty of misconduct in his character of trustee, the complainants had full knowledge of it and acquiesced in it for a great length of time, and there is nothing shown in the evidence to overcome the decisive influence of this knowledge and acquiescence.

DECREE AFFIRMED.

ALLEN v. MASSEY.

1. Under the statute of frauds of Missouri, as interpreted by the highest court of that State, an interpretation which this court will follow, a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and

Statement of the case.

looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors.

2. An assignee in bankruptcy may pursue the property thus attempted to be transferred, and, as auxiliary to its recovery, ask that the sale by the bankrupt be annulled.

APPEAL from the Circuit Court for the District of Missouri; the case being thus:

The fourteenth section of the Bankrupt Act of March 2d, 1867,* enacts that the judge of the District Court or the register in bankruptcy shall assign all the estate, real and personal, of a bankrupt to his assignee in bankruptcy, and that such assignment shall vest in the assignee all the said estate, and all the property conveyed by the bankrupt in fraud of his creditors, and that the assignee may sue for the same.

And the statute of frauds of Missouri enacts,† that "every sale by a vendor of goods and chattels in his possession, or under his control, unless accompanied by delivery within a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith."

These enactments, State and Federal, being in force, one Downing, being indebted to a certain Mrs. Massey, wife of John Massey, conveyed to her a quantity of furniture under the following circumstances: Downing and his family, with John Massey and his family, had been living together in the same house for eighteen years. About five years next previous to the sale now spoken of, they all moved to the house in which they were living at the time of this sale. When they moved into this house Downing furnished a part of it, and Massey a part; Downing furnishing the articles which were the subject of this sale, and which were princi-

* 14 Stat. at Large, 522.

† Revised Statutes of 1865, page 440, chapter 107.

pally furniture for the parlor, library, dining-room, halls, and stairways. Both families used and occupied the parlor, library, and dining-room alike, and made equal use of the furniture of these rooms. Massey did the marketing and paid the bills for household expenses, and attended to matters about the house; he and Downing making settlements from time to time and dividing the household expenses between them.

At the time of the sale Downing and Mrs. Massey went around and looked at the different articles of furniture, took an inventory of it, agreed upon the price; and completed the transaction by Downing turning over to her the furniture, and executing and delivering to her a bill of sale duly acknowledged before a notary public. After the sale both families continued to occupy the house and use the furniture as before; the furniture, however, being subject to the absolute and sole control of Mrs. Massey.

Subsequently to this sale Downing was decreed a bankrupt, one Allen being appointed his assignee.

Hereupon Allen filed a bill in the court below against Massey, his wife, and Downing, to have the sale annulled, and the property given up to him the assignee. The District Court rendered a decree to that effect. This decree being affirmed by the Circuit Court, the defendants brought the case here.

Mr. I. M. Krum, for the appellants; Messrs. H. Hitchcock, G. W. Lubke, and P. Player, contra.

Mr. Justice FIELD delivered the opinion of the court.

The sale was, within the terms of the statute, fraudulent and void as against Downing's creditors. It was not accompanied by any delivery of the property, and was not followed by any change of possession. The property consisted of furniture used in a house occupied jointly by Downing and his vendee and her husband, and it remained in the same condition, and was used by all three precisely in the same manner after the sale as previously. There was no outward

sign manifested, nor *indicia* exhibited, nor notice given, which could apprise the community of any change of ownership. The object of the statute is to prevent parties from being misled by apparent ownership of property where real ownership does not exist, but where a secret transfer has been made to another. This object would be defeated if a sale like the present one could be upheld. In the case of *Claflin* v. *Rosenberg*,* where the vendor had become the clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious, and unequivocal, such as would inform the public, or those who were accustomed to deal with the party, that the property had changed hands, and that the title had passed from the vendor to the purchaser; observing at the same time that possession of this kind excluded the idea of a joint or concurrent possession with the vendor. The statute being a local one, applying only to sales in Missouri, this court will follow the construction given to it by the highest court of the State.

The assignee of Downing's estate was authorized, by the express terms of the fourteenth section of the Bankrupt Act, to pursue the property thus attempted to be transferred, and, as auxiliary to its recovery, to ask that the sale of the bankrupt be annulled.

DECREE AFFIRMED.

RODD *v.* HEARTT.

1. A district judge, sitting as the Circuit Court, may allow an appeal from his own decree.
2. Where the claim on a fund in the Registry of the Admiralty of several mortgages secured in a body by one mortgage, exceeds $2000, an appeal to this court will lie by the mortgagees in a body, though the claim of no one of them exceed the said sum.
3. Where the Circuit Court "decrees" that a fund in court belongs to cer-

* 42 Missouri, 489.

tain persons named, and that their claims be paid, and (the fund not being large enough to pay all the persons in full) orders a distribution by a commissioner, in accordance with the principles laid down by the court, and on a table of distribution being reported by the commissioner, recites that the commissioner had submitted a distribution based *upon the decree* theretofore *made* by the court, and then "orders and decrees" that the fund be distributed according to it, the "decree" may be considered as of either date as respects the matter of a supersedeas.

4. As respects the question whether the appeal was in time to operate as a supersedeas, the case is regulated by the act of June 1st, 1872, which allows sixty days, and not by the Judiciary Act of 1789.

ON motion to dismiss an appeal from the Circuit Court for the District of Louisiana; the case being this:

A steamer having been sold under a proceeding *in rem* in the admiralty, left in the registry of the court $4337.51, claimed on the one hand by Rodd and several other persons, creditors of the owners, who by one mortgage on the vessel had undertaken to secure all these creditors in a body, and on the other hand claimed by Heartt and others, mariners, furnishers of supplies, and material-men. The claim of Rodd under the mortgage was $4825, and of his co-mortgagees over (in the aggregate) $8000. The claims of the opposing mariners, furnishers of supplies, and material-men were $10,151.

The case coming before the District Court that court ordered that the fund in dispute should be paid to Rodd and the others in satisfaction of the mortgage claims. This gave Rodd, who was the largest of the mortgage creditors, $1498.99 as his *pro rata share.*

From this decree of the District Court the mariners, furnishers of supplies, and material-men appealed; and on the appeal, the Circuit Court, on the *3d of June*, 1872, ordered that the decree of the District Court "be avoided and reversed;" and decreed that "the claims of the mariners, furnishers of supplies, and material-men be recognized as superior to those of the mortgage creditors and paid in preference to the latter, and that a new distribution of the proceeds be prepared by the commissioner in accordance with the principles thus laid down."

A new table of distribution having been prepared accordingly, and reported to the court, the following order was entered on the *6th of June*, 1872:

"The commissioner having submitted a distribution based *upon the decree heretofore made* by the court, it is ordered and decreed that the balance of the proceeds of the steamer, now in the registry of this court, be distributed as follows:"

And then followed the names of the distributees and the *pro rata* sum awarded to each.

This decree being made, Rodd and his co-mortgagees, by one petition filed in the Circuit Court, *on the 15th of June*, 1872 (but one Sunday having intervened between that day and the preceding 3d of June), prayed an appeal; and on the same day, the *district* judge sitting in the Circuit Court, allowed it.

Mr. R. De Gray, for the motion, asked the dismissal of the appeal on three grounds:

First. That the appeal was from a decree of the Circuit Court, reversing a decree of the District Court, and was allowed by the district judge; who, though the Judiciary Act makes him a member of the Circuit Court, yet provided "that no district judge shall give a vote in any cause of appeal . . . from his own decision."

Second. Because no one of the claims exceeded $2000; Rodd's, which was the largest, being but $1498.99, and the Judiciary Acts giving an appeal only "where the matter in dispute exceeds $2000."

Third. Because the appeal was not in time to operate as a supersedeas; more than ten days, as the learned counsel alleged, having elapsed from the 3d of June, when, as *he* contended, the final decree was entered, till the 15th, when the appeal was allowed, and the Judiciary Act of 1789, making a writ of error (to which by an act of 1803 any appeal conforms) a supersedeas only in cases where it is served within ten days (Sundays excepted) after the decree has passed.

Mr. T. J. Semmes, contra.

The CHIEF JUSTICE delivered the opinion of the court.*

As to the first of the grounds, on which a dismissal of this appeal is asked, on looking into the acts of Congress relating to the connection of the district judge with the Circuit Court, we are of opinion that, though upon appeals from the District Court the district judge has no vote in the Circuit Court, he has in all other respects the powers of a member of the court, and may consequently allow appeals from its decisions.

Secondly, it is apparent that, though no one of the claims allowed exceeded $2000, yet the claim of the appellants, which was disallowed, exceeded that sum.

Thirdly, we are of opinion that the decree may be considered as of either the 3d day of June or the 6th day of June, 1872, and that the appeal was in time to operate as a supersedeas under the act of 1789. That act, however, does not prescribe the existing rule. The act of June 1st, 1872,† which must govern the case, allows sixty days for the filing of the bond by which the appeal is made to operate as a supersedeas.

MOTION DENIED.

RAILROAD COMPANY v. LOCKWOOD.

1. A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.
2. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.
3. These rules apply both to common carriers of goods and common carriers of passengers, and with especial force to the latter.
4. They apply to the case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose.

---

* This was the last opinion ever delivered by Chief Justice CHASE, and the last also given in the December Term, 1872. It was given on the 1st day of May, 1873. The Chief Justice died on the following 7th.

† 17 Stat. at Large, 198.

Statement of the case.

5. *Query:* Whether the same rules would apply to a strictly free passenger.
6. *Held, arguendo:* That a common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility.
7. That carefulness and fidelity are *essential duties* of his employment which cannot be abdicated.
8. That these duties are as essential to the public security in his servants as in himself.
9. That a failure to fulfil these duties is "negligence," the distinction between "gross" and "ordinary" negligence being unnecessary.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a drover, was injured whilst travelling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff,

and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

It is unnecessary to notice some subordinate points made, as this court was of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on the main question of law stated.

The case was elaborately argued by *Mr. T. R. Strong, for the company, plaintiff in error*, and by *Messrs. Truman Smith and Cephas Brainerd, contra*, early in the last term, with a full citation of authorities; the counsel for the plaintiff in error relying especially on the New York cases of *Welles* v. *The New York Central Railroad Company*,* *Perkins* v. *Same*,† *Smith* v. *Same*,‡ *Bissell* v. *Same*,§ *Poucher* v. *Same*,‖ by which he argued that the case was to be determined; those being decisions of the highest court of the State of New York, within whose jurisdiction the contract was made and to be executed, and where the alleged cause of action occurred. Being held under advisement till this term—

Mr. Justice BRADLEY delivered the opinion of the court.

It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which

* 24 New York, 181; S. C. 26 Barbour, 641.
† 24 New York, 196.
‡ Ib. 222; S. C. 29 Barbour, 132.
§ 25 New York, 442; S. C. 29 Barbour, 602.
‖ 49 New York, 268.

needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enact-

ments have been made by State legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employés, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.*

But since the decision in the case of *The New Jersey Steam Navigation Company* v. *Merchants' Bank*,† by this court, in January Term, 1848, it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of *The New Jersey Steam Navigation Company* v.

* Cole v. Goodwin, 19 Wendell, 257; Gould v. Hill, 2 Hill, 623.

† 6 Howard, 344.

Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the

mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that State to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr* v. *The New Jersey Steam Navigation Company*, decided in 1850.* This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities,—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*, in 6th Howard, and such we consider to be the law in the present case." And in *Stoddard* v. *Long Island Railroad Company*,† another ex-

* 4 Sandford, 136. † 5 Id. 180.

press case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the Supreme Court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases,* all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Welles* v. *New York Central Railroad Company*,† that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket, which exempted the company from liability. In 1862 the Court of Appeals by a majority affirmed this judgment,‡ and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. *Perkins* v. *The New York Central Railroad Company*,§ was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

* Parsons v. Monteath, 13 Barbour, 353; Moore v. Evans, 14 Id. 524.
† 26 Id. 641. ‡ 24 New York, 181. § Ib. 196.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith* v. *New York Central Railroad Company*,* decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the Court of Appeals in 1862 by a vote of five judges to three.† Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the

* 29 Barbour, 132. † 24 New York, 222.

company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, *Bissell* v. *The New York Central Railroad Company*,* first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "*whether of negligence by their agents, or otherwise*," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals,† four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by *Welles* v. *The Central Railroad Company;* but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor,

* 29 Barbour, 602. † 25 New York, 442.

and by Justice Denio against the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher* v. *New York Central Railroad Company** is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts which, by dicta or decision either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here.†

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a

* 49 New York, 268.

† Ashmore v. Pennsylvania Steam, &c., Co., 4 Dutcher, 180; Kinney v. Central Railroad Co., 3 Vroom, 407; Hale v. New Jersey Steam Navigation Co., 15 Connecticut, 539; Peck v. Weeks, 34 Id. 145; Lawrence v. New York Railroad Co., 36 Id. 63; Kimball v. Rutland Railroad Co., 26 Vermont, 247; Mann v. Birchard, 40 Id. 326; Adams Express Co. v. Haynes, 42 Illinois, 89; Ib. 458; Illinois Central Railroad Co. v. Adams Express Co., Ib. 474; Hawkins v. Great Western Railroad Co., 17 Michigan, 57; S. C., 18 Id. 427; Baltimore and Ohio Railroad Co. v. Brady, 32 Maryland, 333; 25 Id. 128; Levering v. Union Transportation Co., 42 Missouri, 88.

question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."*

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents.† "The doctrine is firmly settled," says Chief Justice Thompson, in *Farnham* v. *Camden and Amboy Railroad Company*,‡ "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." This inability is affirmed both when the exemption stipu-

* Stinson v. New York Central Railroad Co., 32 New York, 337.

† Laing v. Colder, 8 Pennsylvania State, 479; Camden and Amboy Railroad Co. v. Baldauf, 16 Id. 67; Goldey v. Pennsylvania Railroad Co., 30 Id. 242; Powell v. Same, 32 Id. 414; Pennsylvania Railroad Co. v. Henderson, 51 Id. 315; Farnham v. Camden and Amboy Railroad Co., 55 Id. 53; Express Company v. Sands, Ib. 140; Empire Transportation Co. v. Wamsutta Oil Co., 63 Id. 14.

‡ 55 Pennsylvania State, 62.

lated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Pennsylvania Railroad Company* v. *Henderson*,* a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants.† In *Davidson* v. *Graham*,‡ the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In *Welsh* v. *Pittsburg, Fort Wayne, and Chicago Railroad*,§ the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts, the court reasons that it is

* 51 Pennsylvania State, 315.

† Jones v. Voorhees, 10 Ohio, 145; Davidson v. Graham, 2 Ohio State, 131; Graham v. Davis, 4 Id. 362; Wilson v. Hamilton, Ib. 722; Welsh v. Pittsburg, Fort Wayne, and Chicago Railroad, 10 Id. 75; Cleveland Railroad v. Curran, 19 Id. 1; Cincinnati, &c., Railroad v. Pontius, Ib. 221; Knowlton v. Erie Railway Co., Ib. 260.

‡ 2 Ohio State, 131.

§ 10 Id. 75, 76.

specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." And in relation to a drover's pass, substantially the same as that in the present case, the same court, in *Cleveland Railroad* v. *Curran*,* held: 1st. That the holder was not a gratuitous passenger; 2dly. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of *Bissell* v. *The New York Central Railroad*,† and of *Pennsylvania Railroad* v. *Henderson*,‡ and expresses its concurrence in the Pennsylvania decision. This was in December Term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c.,§ yet in a case where it was stipulated that a rail-

* 19 Ohio State, 1, 12, 13.

† 25 New York, 442.

‡ 51 Pennsylvania State, 315.

§ Fillebrown v. Grand Trunk Railway Co, 55 Maine, 462.

road company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances."*

To the same purport it was held in Massachusetts in the late case of *School District* v. *Boston, &c., Railroad Company*,† where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence."

To the same purport, likewise, are many other decisions of the State courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.‡

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in ac-

* Sager v. Portsmouth, 31 Maine, 228, 238.

† 102 Massachusetts, 552, 556.

‡ Indianapolis Railroad v. Allen, 31 Indiana, 394; Michigan Southern Railroad v. Heaton, 31 Id. 397, note; Flinn v. Philadelphia, Wilmington, and Baltimore Railroad, 1 Houston, 472: Orndorff v. Adams Express Co., 8 Bush, 194; Swindler v. Hilliard & Brooks, 2 Richardson (So. Car.), 286; Berry v. Cooper, 28 Georgia, 543; Steele v. Townsend, 37 Alabama, 247; Southern Express Co. v. Crook, 44 Id. 468; Whitesides v. Thurlkill, 12 Smedes & Marshall, 599; Southern Express Co. v. Moon, 39 Mississippi, 822; New Orleans Mutual Insurance Co. v. Railroad Co., 20 Louisiana Annual, 302.

cordance with the early English authorities. St. Germain, in The Doctor and Student,* pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of Maxims as unquestioned law.† And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Steven, in his Commentaries,‡ after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice."§ But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking.‖ Justice Story, in his work on bailments,¶ originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.

* Dialogue 2, c. 38. † Noy's Maxims, 92. ‡ Vol. 2, p. 135.
§ Evidence, vol. 2, p. 205, 6th American edition.
‖ Hinton v. Dibbin, 2 Adolphus & Ellis, new series, 649; Wyld v. Pickford, 8 Meeson & Welsby, 460. ¶ Sec. 571.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of *Peek* v. *The North Staffordshire Railway Company*,* Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr* v. *Lancashire Railroad Company*,† and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable.‡ Upon this statute ensued a

* 10 House of Lords Cases, 473.

† 7 Exchequer, 707.

‡ 1 Fisher's Digest, 1466.

long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of *The New Jersey Steam Navigation Company* v. *Merchants' Bank*.* On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to carriers of passengers, Mr. Justice Grier, in the case of *Philadelphia and Reading Railroad* v. *Derby*,† delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of *The Steamboat New World* v. *King*,‡ which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as

* 6 Howard, 883. † 14 Id. 486. ‡ 16 Id. 469, 474.

resting not only on public policy, but on sound principles of law."

In *York Company* v. *Central Railroad*,* the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker* v. *The Transportation Company*, decided at the same term,† it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Company* v. *Kountze Brothers*,‡ where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and

* 8 Wallace, 118. † Ib. 150. ‡ 8 Id. 342, 353.

leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company

a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.*

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most

* Davidson v. Graham, 2 Ohio State, 131; Graham v. Davis & Co., 4 Id. 362; Swindler v. Hilliard, 2 Richardson, 286; Baker v. Brinson, 9 Id. 201; Steele v. Townsend, 37 Alabama, 247.

stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr* v. *The New Jersey Steam Navigation Company*,* the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by indi-

* 1 Kernan, 485.

vidual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so

under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at

all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the

obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great

care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities.* If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."† Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature.‡ But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negli-

* 1 Smith's Leading Cases, 453, 7th American edition; Story on Bailments, § 571; Wyld v. Pickford, 8 Meeson & Welsby, 460; Hinton v. Dibbin, 2 Queen's Bench, 661; Wilson v. Brett, 11 Meeson & Welsby, 115; Beal v. South Devon Railway Co., 3 Hurlstone & Coltman, 337; Grill v. Iron Screw Collier Co., Law Reports, 1 Common Pleas, 600; Philadelphia & Reading Railroad Co. v. Derby, 14 Howard, 486; Steamboat New World et al. v. King, 16 Id. 474.

† Art. 1382.

‡ Vol. 6, p. 248.

gence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

JUDGMENT AFFIRMED.

STITT *v.* HUIDEKOPERS.

1. It is a rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never existed.
2. An offer to sell at a fixed price, whether accompanied with an agency to sell to others or not, may be revoked at any time prior to the acceptance of the offer, unless there is an express agreement on good considera-

tion to accept within a limited time, or when other acts are done which the person making the offer consents to be bound by.

3. An offer to take $40,000 in cash is not accepted so as to bind the party by a contract which leaves the buyer at liberty to withdraw by forfeiting a deposit of $10,000, or pay the remainder within sixty days.
4. Although a written agreement between persons not parties to the suit may, as a general rule, be contradicted or explained by oral testimony, this does not apply to an attempt to make good by parol evidence a contract which the law requires to be made in writing to make it valid.
5. When one party gives notice to another to produce on trial a written instrument, and the party who so receives the notice produces and offers to verify it by his oath, the other party cannot refuse to use that paper and introduce a *copy* in the first instance, on the allegation that the first is not genuine, although he might show wherein it was erroneous or defective after it was once introduced.
6. It is not error for a court, leaving to the jury the credibility of the testimony and their belief of certain material facts, to instruct the jury that they must, if they so believe, find for one party, though this may be all that is in contest.
7. Nor is it error for a court in its instructions to limit them to the special contract which alone was considered by counsel on both sides, and when no evidence of the value of services was given or instructions asked as applicable to a common count found in the declaration.

ERROR to the Circuit Court for the Western District of Pennsylvania; the case being thus:

In the latter part of August, 1864, at which time great excitement prevailed in the region of Oil Creek, Northwestern Pennsylvania, and some persons in New York and other eastern cities, were largely speculating in lands there supposed to contain oil, and rapid sales at advancing prices were making of such lands from day to day, Alfred Huidekoper and Frederick W. Huidekoper, his nephew, both of Meadville, near that region, owning of long date, partially in their own rights but more largely in a fiduciary capacity, as executors and trustees, about 1300 acres of such lands in the immediate district, were called on by one Stitt, who had in part formed and was still cultivating relations with persons in New York and other cities operating in oil lands; and an agreement was made between him and the said Huidekopers that if he, Stitt, brought a purchaser to them for the land, within thirty days, at a fixed price, he was to have a definite

compensation. The time thus limited expired without a sale.

On the 19th—22d of November a new agreement was entered into in regard to the same matter, by which it was agreed that Stitt might sell the land for not less than $40,000; that on this sum being paid to the Huidekopers, he should have out of it as a compensation $2500, and that if he could sell the land for more than $40,000 he should retain the surplus for himself. With a view of enabling Stitt to sell and convey the land with despatch and facility—his business being chiefly with persons who were buying on speculation, and who wished to re-sell *soon* at an advance—the Huidekopers made to him a deed, duly signed and acknowledged, which they placed as an escrow, in the hands of Drake Brothers, their bankers, in New York, to become a valid deed when Stitt should pay $40,000 into the hands of the said Drake Brothers, for the use of them the Huidekopers. Whether there was any limitation of time within which the sum of $40,000 was to be paid to enable Stitt to take up the deed and entitle himself to the compensation, and whether, if there was no limitation of time, there was any other agreement as to an indefinite extension, which would prevent the Huidekopers from recalling the escrow, or the authority to deliver it, so as to render nugatory pending negotiations for a sale by Stitt to third parties, was a matter in dispute.

The escrow being, as already mentioned, in the hands of Drake Brothers, and to be delivered to Stitt on the payment of the $40,000, Stitt, on the 10th of January, 1865, entered into a written contract with Backus & Morse, operators, in New York, in oil lands, by which contract Stitt agreed to sell the lands, *or certain specified portions*, at $55 per acre, to them. Backus & Morse, however, did not agree to buy, but agreed to decide on or before the 14th of January, 1865, whether they would buy, and if so, *how much*. They agreed that if they decided to buy, they would deposit with Drake Brothers, on or before the said 14th, $10,000, which was to be paid to Stitt as soon as the titles were examined and found

perfect, and a deed from Stitt was to be deposited with Drake Brothers, to be held until the balance of the purchase-money was paid or *satisfactorily secured*. The time of payment of the balance was not *to exceed sixty days* from the payment over to the plaintiff of the $10,000. Of course if Backus & Morse took the whole 1300 acres, the sum payable would be $71,500; a large gain to Stitt.

On the 14th of January, 1865, Backus & Morse elected, *by parol*, to take all the lands, and made the deposit with Drake Brothers of $10,000; their election, however, not being according to the contract, but on condition that "*if the balance of the purchase-money is not deposited by the time specified in the contract, the* $10,000 *is to be forfeited to Mr. Stitt;*" and their election in this form being indorsed by Drake Brothers upon the contract.

On the same 14th of January Stitt wrote to the Huidekopers for an abstract of title. They sent one within two or three days afterwards (apparently from its date, on the 16th), to Drake Brothers, which Stitt saw there, and of which he had a copy made. In the letter of Stitt asking for the abstract, Stitt mentioned the *fact* of a sale, but mentioned no particulars of it whatever, nor the names of the purchasers.

On or about the 19th Stitt mentioned to three different persons, as they testified, that he had made a good sale of the lands, but had transcended his authority; that he was bound to sell strictly for cash, and that the Huidekopers were under no obligations to ratify.

On the 24th of January, 1865—the lands, owing to the discovery of a well called the United States well, having greatly risen and apparently still rising in value, and Stitt not having communicated to the Huidekopers the particulars of his contract with Backus & Morse, nor, so far as appeared, the Huidekopers knowing or suspecting that any *such* sale had been made as Stitt had effected, the Huidekopers revoked the authority of Stitt. On the 27th of the same month Stitt tendered the money ($40,000) to Drake Brothers and demanded the deed, which, in compliance with

instructions sent to them on the 24th by the Huidekopers, they refused to give up to him.

Hereupon Stitt brought this suit in the court below against the Huidekopers, upon an alleged joint contract by them with him, to recover for services rendered to them, as a real estate broker. The *narr.* contained a special count, that the defendants employed him to sell for them, or negotiate and consummate a sale for them of a body of lands for the price of $40,000, or more, agreeing to pay him $2500 out of the purchase-money, in case he made a sale, and also agreeing to allow him all he might sell the lands for more than $40,000. A *quantum meruit* was added.

On the trial, one point in dispute was whether the new or second contract between Stitt and the Huidekopers—that is to say, the contract of the 19th—22d of November—whether that contract had in it any limitation of time.

Stitt testified that he asked to have a time fixed, during which he might operate, to sell the lands, and that Alfred Huidekoper declined to fix one; stating that it was better for him that no time should be fixed.

On the other hand each of the Huidekopers testified that two papers were drawn up and signed by them both, one fixing the time *until December 1st*, 1864, and the other agreeing to refund to Stitt $2500 if he paid the $40,000; and took up the deed. They each further testified that both papers were given to Stitt. A call was made on Stitt to produce them.

Further on in the trial the plaintiff offered himself as a witness, his testimony to be followed by that of Backus and of Morse—all the parties to the contract—that when the contract of January 10th, 1865, of Stitt with Backus & Morse was made, it was the intention and agreement of the parties to provide in it that the purchase-money should be paid as soon as the titles could reasonably be examined, and that it was a mutual mistake that the language of the contract was not made to express that understanding, and that the omission in the contract of such words as were necessary to clearly express that conclusion was a mutual mistake,

such as cught to be corrected. The court refused to let the evidence go in; and this was ground of one exception.

A matter alleged by the plaintiff and denied by the defendants was, that the defendants had ratified Stitt's sale to Backus & Morse; and to show a ratification the plaintiff offered his *copy* of the abstract of title already spoken of, as having been made by his direction from an admitted original confessedly sent by the Huidekopers to Drake Brothers.

The defendants objected to the admission of the copy, and offered to produce, under a notice which the plaintiff had given, what they alleged to be the original, and thereupon did produce the same. The plaintiff denied that the paper produced was the original, and proposed to prove by himself that the paper was not the original.

To this offer the defendants objected that the original produced on notice was the best and only evidence; that it was not competent to the plaintiff to refuse it on his own allegation that it was not the original, and thereupon, and in its presence, and upon the footing of his own denial to introduce secondary evidence of the paper.

"The defendants being in court and ready to be examined to prove that the paper produced was the original, and the plaintiff declining to examine them, the court sustained the objection and rejected the copy." This, too, was matter of exception.*

* It may be here stated that some of the testimony in the case left room for argument by the defendants, if it should be necessary to make it, that the plaintiff had not shown that Alfred Huidekoper, who was stationary at Meadville, had ratified all that his nephew Frederick, who was a good deal in New York, and attended to things there, had done, though no such defence was set up. But the action being on an alleged *joint* contract, where both defendants were liable or neither was, it was necessary to show the knowledge and assent of Alfred. Apparently, to show *this*, Stitt, in giving an account of the transaction generally, stated that he knew Frederick's handwriting, and that the abstract sent to Drake Brothers was not in *it* but in Alfred's. Both the Huidekopers swore that it was not so, but was in Frederick's. The "original" produced by the Huidekopers being in Frederick's, and not sustaining Stitt, he desired when he came to show the confirmation by both parties to have his copy, *with his above-mentioned testimony*, in evidence. As the Reporter understood the case, there was no difference alleged

Statement of the case.

There was no evidence offered of the value of the plaintiff's services, under the common count, nor any instructions requested on it. On the contrary, the counsel of the defendants (without apparent objection on the other side) requested certain instructions "in view of the *admitted fact* that the plaintiff was not to be paid for either, or to receive *anything* at all unless he sold the lands and paid over the money according to agreement."

Respecting the evidence the court instructed the jury very fully; what follows being extracts from the charge:

"The evidence is for you—its credibility—its consistency—its weight—what it is, and what it proves. If there is a conflict in the testimony, you are to consider it, and when it is impossible to reconcile different statements of witnesses, you are to determine conscientiously, not arbitrarily, which you will believe. You are not to know the parties, or yield at all to what you may have heard respecting the case outside of the jury box. The questions for you are, what does the evidence prove; and under the instructions of the court, what is the law in regard to the facts proven.

"In regard to the arrangement of November 19th—22d, there is a discrepancy between the testimony of the plaintiff and that of the defendants. Mr. Stitt testifies that he asked to have a time fixed during which he might operate to sell the lands, and that Mr. Alfred Huidekoper declined, stating it was better for him no time should be fixed. On the other hand, both the defendants testify that two papers were drawn and signed by them both, one fixing the time until December 1st, and the other agreeing to refund $2500 if the plaintiff took up the deed. These papers, they say, were delivered to the plaintiff. Of this Alfred Huidekoper is positive, and Frederick thinks they were delivered. A call has been made for these papers, and they have not been produced. Were any such papers given? *You should reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testi-*

between the two briefs or abstracts; the allegation being only that the one produced was not the "original" that had been sent to Drake Brothers, where Stitt had seen it, and which he had sworn was in Alfred's writing.

fies to a negative. Why? It is because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed. . . . . .

"Was there an agreement to allow to Stitt a refusal of the lands indefinitely? Is this probable, considering the fluctuating value of lands in the oil region? Did Alfred Huidekoper agree to give such a perpetual or indefinite refusal. This is a suit upon an alleged joint contract, and both defendants must be liable, or neither is. The evidence seems to show, though this is for you," &c.

[The learned judge then reviewed the testimony.]

Respecting the law the court charged:

"*If* such papers [those which the Huidekopers had testified were given, one limiting the time for sale till 1st December, 1864] were given—if such was the contract, the plaintiff's right to take up the deed on the payment of $40,000, and his agency to sell the lands for the defendants expired on the 1st of December, 1864; and as his bargain was contingent, he had thereafter no legal claim against the defendants for what he had done, or expended, and no right to act as their agent farther, unless there was a new contract, of which I shall have something to say presently. But this is not a very important matter. If you should find there was no such limitation, still the defendants had a legal right to withdraw their deed, and put an end to the agency at any time they chose, without the plaintiff having any legal right to complain.

"Notwithstanding the arrangement of Stitt with Backus & Morse, the Huidekopers had a clear right to withdraw their deed from Drake Brothers or to prohibit its delivery, and refuse to continue the plaintiff's agency. Further, the defendants were executors, and trustees of the lands. It was their duty to obtain the highest possible price for them. When the discovery of the United States Well, or any other thing gave to the property an enhanced price in the market, it was their duty as well as their right, unless they were restrained by some previous contract, to withdraw any refusal they had given, that interfered with their power to make a sale most beneficial to their *cestui que trust*.

"The revocation of the power to deliver the deed, if you be-

lieve it was made, put an end to the plaintiff's right to take the lands under the special arrangement with the defendants, and in effect terminated his agency. The subsequent tenders, even if made in good faith, and kept alive, were therefore of no effect; and you need not trouble yourselves to consider them.

"Nor is there any evidence of ratification that would justify you in finding that the defendants did ratify the bargain made by the plaintiff with Backus & Morse. Knowledge is essential to ratification. A man cannot be held to ratify that which he does not know. What evidence is there that the defendants were informed of the nature and stipulations of the contract of January 10th, before they revoked the authority of Drake Brothers, if any they ever had, to deliver the deed? It is not pretended that they had any such information. On the 14th of January, Stitt wrote them that he had sold the lands, and that $10,000 were paid. He did not mention the terms of the sale. He did not say it was no sale for cash, or that it was a refusal given to the purchasers without liability on their part to pay the whole purchase-money. He did not say what the price was. He did not name the purchasers. Now if he made the sale as agent of the defendant, his duty was plain. It was to inform them at once of all he had done. Instead of this, you may be of the opinion that he concealed from them what they had a right to know. He gave them no copy of the contract, and they were left uninformed in regard to its contents, until after they concluded to revoke the plaintiff's authority, and resume the control of their deed. Under these circumstances . . . the sending of an abstract of title to Drake Brothers ought not to be treated as an assent to or ratification of an agreement of which the defendants had no particular knowledge, and which it was impossible for them to obtain; especially is this true when he who attempts to show ratification is the person whose duty it was to give the defendants full information, and to furnish them with a copy of the contract he had made while claiming to be acting as their agent.

"You will not overlook the evidence that the plaintiff admitted he had transcended his authority upon this subject.

* * * * *

"The great and controlling question is, whether the plaintiff made such a sale, or rather whether the contract made by him with Backus & Morse was such a sale or negotiation of a sale

as the plaintiff, under his agency for the defendants, as set forth in the declaration and proved here at the trial, had authority to negotiate. If it was not—and I have instructed you that it was not—the defendants had a legal right to refuse to accept it, and to withdraw all authority they had given, and if you believe that they did so, your verdict should be for the defendants."

The jury found accordingly, and judgment was entered on the verdict. Stitt now brought the case here. There were twenty-four assignments of error, and there was the signature of the judge who tried the cause to as many exceptions in the record. There was also, besides these and the pleadings, a confused mass of what were called "judge's notes," "depositions," &c., of which it was impossible to tell whether they were intended to be parts of the bill of exceptions, or on what principle they were to be considered by this court.

Mr. G. W. Guthrie, with whom were Mr. J. K. Kerr and Mr. E. S. Golden, for the plaintiff in error; Mr. W. D. Davidge, contra.

Mr. Justice MILLER delivered the opinion of the court.

The argument, as is generally the case when such a transcript as the one in this case comes before us, has been largely made up of controversies as to what the evidence establishes, which was proper for the consideration of the jury but is out of place in a court of errors.

It will not be profitable or necessary to notice all the alleged errors in this decision. Those alone which are decisive of the case will be considered. The remainder may be treated as not well taken or not presented by the record.

One of the errors assigned and insisted on grows out of the conflict in the testimony between the plaintiff and the two defendants, all of whom were sworn as to two papers, which the defendants aver were signed by them and delivered to the plaintiff at the time the escrow was signed, one of which limited the time within which the plaintiff could pay the money and take up the deed to the 1st of December,

and the other agreed to give him $2500 out of the $40,000 so paid. No such papers were produced, and on this point the testimony is conflicting. The plaintiff denies the receipt of any such papers, and both the defendants swear positively to their delivery to plaintiff.

On this subject the court charged the jury "that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed."

We are of opinion that the charge was a sound exposition of a recognized rule of evidence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here.

Leaving to the jury the question of the existence of this limitation of the contract, the court charged in various shapes that, if there was such a limitation, after its expiration, or, if there was none, then, at any time before the payment of the money, the defendants had a right to withdraw the escrow and terminate the plaintiff's agency without accountability to him.

And this view put forth by the court, which was the turning-point in the case, is the error much insisted on here, and assigned in various forms.

The proposition may be looked upon in two aspects: 1. As regards a sale to plaintiff himself, on his payment of the $40,000. 2. As a contrivance to facilitate his sale of the lands as agent of defendants. In reference to the first, we are of opinion that as no pretence is set up of any payment or offer to pay until some time in January, 1865, long after the time limited, if there was a limitation, the utmost that can be justly claimed against defendants is, that it was an open offer of sale at a given price, which bound them only on its acceptance and compliance with its terms; and that until that was done the offer was within their control, and it was entirely within their power to withdraw it. It would

seem useless to argue such a proposition. But we will mention two considerations which are conclusive:

1. On any other hypothesis, there is a want of consideration in the contract, the defendants being bound for an indefinite period of time to accept the money whenever it might suit the plaintiff to pay it, while he was not bound to pay or abandon the right to pay at any period within any fixed time. 2. That unless the party making such offer could withdraw or terminate it at his pleasure, there would be no means of relieving him from the danger of its acceptance at any length of time after it was made, and under any changes of circumstances which accompanied his offer. And so are the authorities.

If we examine the proposition as one of agency, it is still clearer that unless there was a contract binding the defendants to accept and ratify a sale by the plaintiff for the sum of $40,000 or more, made at any time, they could, before such sale was completed, withdraw and revoke the plaintiff's agency without liability to him on account of the special offer set up by him.

The charges of the court as to the law of this branch of the case, were, therefore, correct.

It is, however, strenuously contended by counsel for the plaintiff, that before the defendants revoked the agent's authority, by ordering Drake Brothers not to deliver the escrow to him, he had made a valid sale within the terms of the offer, which was an acceptance of that offer, and binding on the defendants.

As regards this branch of the case, it is to be remarked that this is not a suit by the supposed purchasers, Backus & Morse, either to enforce specifically that contract of purchase, or to recover damages for its breach. But it is a suit by the agent who negotiated it to recover against the owners of the land what he would have been entitled to if the contract had been carried out. In this view, it is important to remember that if the plaintiff had paid into the hands of Drake Brothers the $40,000 at the time he deposited with

them his written agreement with Backus & Morse, he would have been entitled to a delivery of the escrow, and would probably have received it, and thus prevented all controversy.

As he did not do this, it becomes necessary to inquire what he did that could bind the defendants. The written agreement between Stitt on the one part, and Backus & Morse on the other, is in the record. It is an agreement, in effect, that if Backus & Morse shall elect to buy all or any part of the several tracts of land included in the conveyance in escrow to Stitt, within four days, they may do so at the price of $55 per acre, on depositing with Drake Brothers the sum of $10,000; the remainder to be paid within sixty days after the first deposit. On the last of these four days, it appears by an indorsement made by Drake Brothers on this contract, that Backus & Morse paid in the $10,000 and elected to take the whole of the lands; the $10,000 to be returned if the title was not found to be good, and forfeited to Stitt if the balance of the purchase-money was not paid within the time stipulated.

By the agreement as originally made and signed by Stitt, Backus, and Morse, the latter are bound to nothing. They had an option for four days of all or any part of the land at $55 per acre, and they had sixty days after their election was made to pay the principal part of the purchase-money. By their payment of the $10,000, they placed themselves in relation to Stitt in a position where they could forfeit the $10,000 and thereby release themselves, or pay the balance within sixty days and claim a conveyance of the land. Looking to these papers as the proper evidence of the contract between Stitt, on the one part, and Backus & Morse on the other, it is clear that there was never any obligation on the part of the latter to take the land and pay for it at a definite price; that by forfeiting the $10,000 they could be released from any further performance of that agreement.

This statement of the nature of that contract is sufficient to show that it was no compliance with the outstanding offer of the defendants to Stitt.

They had never offered to accept any such contingent or optional contract of purchase, nor had they agreed to accept of any contract on time. Forty thousand dollars paid into Drake & Brother's hands was the only valid acceptance of their offer which could bind them.

The plaintiff offered to introduce some parol testimony to show that the obligation of Backus & Morse was to take and pay for the land as soon as the title could be examined. This was excluded by the court, and its exclusion is assigned for error. While it is certainly true that in some classes of cases a contract between persons not parties to the suit may, when introduced, be contradicted or varied by parol testimony, the principle can have no application in a case like the present. This was a contract concerning real estate, which the statute required to be in writing to make it valid. And certainly the defendants were not bound to accept such an incomplete contract as binding on them, while its obligatory force as to the other party depended on parol evidence.

We are of opinion that no such contract of sale by Stitt was proved as the defendants were bound to accept before they revoked his agency.

An attempt was made to show that the contract with Backus & Morse was ratified by the defendants, and an abstract of title furnished by them was relied on for this purpose. On motion of the plaintiff's counsel the defendants produced what they claimed to be the original of this abstract. The plaintiff thereupon offered a copy of the abstract, which he insisted was different from the one produced by the defendants and which he wished to introduce. This was overruled. It is a little difficult to understand precisely how all this was done, as the bill of exceptions states that the defendants were ready to verify by their oath the genuineness of the abstract which they produced. At all events it seems to us that the court was right in refusing to admit *in the first instance* what was conceded to be a *copy*, when that which was

at least *primâ facie* the original was in court to answer the notice of the party desiring to use the copy. How far the plaintiff could have been permitted to show a variance of the defendants' paper from the genuine, after it was once introduced, we need not inquire. But a copy could not be introduced until what seemed to be the original had been before the court and become the subject of inspection by the jury.

It has been urged that the court invaded the province of the jury by giving instructions which left them no alternative but to find for the defendants. It may be true that, under the charge of the court, they could do nothing else. But a careful examination of the whole charge, which is before us, shows that the court left the credibility of the witnesses, and all disputed facts, to the jury, and based its instructions to find for the defendants on their belief of propositions which required such a verdict. This objection is largely based upon the argument that the jury might have found for the plaintiff a reasonable compensation for his services on the common count, but to this it is a sufficient answer to say that no testimony was offered of the value of the services rendered under this count, nor any instructions asked of the court on that count, and that through the whole trial plaintiff insisted on his special contract, and *that alone*, as the ground of his recovery.

We see no error in the record, and the judgment of the Circuit Court is

AFFIRMED.

CONWAY *v.* STANNARD.

Under the fifteenth section of the act of July 18th, 1866 (14 Stat. at Large, 180), providing for the sale of unclaimed perishable property, or property the expense of keeping which would reduce the proceeds of sale (as *ex. gr.*, horses), of less value than $500, used in smuggling goods into the United States, the collector need not give the twenty days allowed by previous sections in the case of like property, non-perishable, for the

Statement of the case.

claimant to prefer his claim to it, and allow fifteen days' notice of sale, but may publicly advertise it for sale at once, on seizure, and proper certificate by appraisers of its value and character, and, after not less than one week's notice, may sell it.

ON certificate of division between the judges of the Circuit Court for the District of Vermont; the case being thus:

Before the act of July 18th, 1866,* was passed it was necessary, in all cases of seizure of property for violation of the revenue laws, to institute proceedings in court for its condemnation.

The statute referred to effected a change in the mode of proceeding where the property in question did not exceed in value $500, and provided a way in which the title of the owner could be divested without enforcing the forfeiture in court.

By the eleventh section the seizing officer was required, after having caused the property to be appraised, to give notice for three successive weeks, describing the property, stating the time, place, and cause of seizure, and requiring any person claiming it to appear and file his claim with the collector *within twenty days* from the first publication of such notice.

By the twelfth section, if a claimant appeared within the time prescribed, *i. e.*, within twenty days from the first publication of this notice, filed his claim with the collector, and gave proper bond, the forfeiture had to be enforced in the proper court as in cases exceeding $500 in value. But if no claimant appeared within that time the officer was directed to advertise the property for sale, giving *not less than fifteen days' notice of sale*, and to deposit the proceeds of sale in the treasury. By the thirteenth section it was enacted that if it should happen that the owner, notwithstanding the publicity given to the transaction, did not know of the seizure and sale, and was not guilty of any intentional fraud on the revenue, the Secretary of the Treasury, on satisfactory proof of these facts, within three months from the deposit of the

* 14 Stat. at Large, 180.

money, might remit the forfeiture and restore the proceeds of sale.

The fifteenth section of the act—the section on which the dispute in this case turned—requires the officer, if the property, being of less value than $500, shall be certified on oath by the appraisers, in their belief, to be liable to perish or deteriorate by keeping, or cannot be kept without disproportionate expense, "*and when no claim shall have been interposed therefor as hereinbefore provided*," to advertise that he had seized and would sell it, giving not less than *one week's* notice of such seizure and intended sale.

This act of 1866 being in force, Stannard, as an officer of the customs for the district of Vermont, on the 14th of January, 1868, seized the *horses*, harness, and sleigh of one Conway, as being engaged in smuggling goods from Canada. He caused the property to be appraised immediately, and the appraisers finding it worth $191, and no claim being interposed, and the appraisers certifying their belief on oath that it was liable to speedy deterioration by keeping, and that the expense of keeping it would largely reduce the net proceeds of the sale of it, the collector gave public notice on the 15th that he would sell it on the 29th following, and accordingly did sell it on the said 29th of January; that is to say, without allowing Conway twenty days from the notice of seizure within which to prefer his claim. The proceeds were paid into the treasury.

Hereupon Conway brought trespass *de bonis asportatis*, in the court below, for taking and carrying away the horses, &c.

The collector pleaded the facts as above given.

The plaintiff demurred to the plea, and the opinion of the judges being opposed upon the question whether the plea was a bar to the action, the question was certified for decision here.

Mr. L. P. Poland, for the plaintiff, and in support of the demurrer:

The substantial effect of a seizure and sale of property under the provisions of the act of 1866, is to deprive the

owner of his property without any judicial determination against him, or against his property. He may, indeed, within three months, at his own cost and expense, appeal to the clemency or discretion of the Secretary of the Treasury, but all legal intendments and presumptions are against him; the burden of proof is thrown upon him, to show that his property was not forfeited, or that the violation of law was unintentional; and even this will not suffice, unless he also prove that he had no knowledge of the seizure.

The proceeding is far more *in invitum* than those usually so characterized,—tax sales, or sales on execution, and the like. The notice by publication is all the notice that the owner of the property is required to have before he is deprived of his property by an official and quasi judicial sale.

This mere statement of the statute, and of its severe penal consequences, is enough to show that every requirement of it should be strictly observed.

Now, by the fifteenth section, the owner is expressly given twenty days within which to file his claim and bond, and thus entitle himself to a legal trial before he is deprived of his property. The section enacts that if the appraisers certify that the property is perishable, or cannot be kept without disproportionate expense, "AND WHERE NO CLAIM SHALL HAVE BEEN INTERPOSED THEREFOR, AS IS HEREINBEFORE PROVIDED," then the officer may proceed to advertise and sell the property, and shall at such time as he thinks reasonable, BUT NOT LESS THAN ONE WEEK. These are absolute and indispensable conditions required by the law, before the seizing officer has any authority to even advertise the property for sale, and so absolutely essential are they for the protection of the owner that they cannot be disregarded.

In the present case the defendants utterly disregarded these provisions, and proceeded to advertise the property for sale on the next day after seizing it, without notice to the plaintiff and without opportunity to assert his claim. The case then is that of an officer who has neglected to perform an act legally required as preliminary to a sale. And for this violation of law—wanton and flagrant in this case—

all the authorities, from the *Six Carpenters' Case** to this time,† make the defendant a trespasser *ab initio* and liable in trespass for the property.

But under any circumstances the plea is no bar.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is conceded by the demurrer that the property was subject to forfeiture, but the counsel for the plaintiff insists that the officer sold it before, by law, he had a right to do so, and that this act makes him liable as a trespasser *ab initio*. It is unnecessary to consider the last point, because, in our opinion, the seizing officer observed the requirements of the statute on this subject, and is, therefore, protected from suit.

It is further insisted, on the part of the plaintiff, that he was allowed by the terms of the section twenty days from notice of seizure within which to prefer his claim, and as this condition was violated by the officer making the sale, the plea is not a bar to the action. This construction is more plausible than sound. It cannot be adopted, because it is inconsistent with other positive directions, about which there is no controversy, and would, besides, defeat the manifest purpose that Congress intended to accomplish by this legislation.

This section is the last of the series concerning the seizure and sale of property worth less than $500. The sections which precede it apply to property generally of this limited value, while this affects property of the same value, but of a

* 1 Smith's Leading Cases, 274, 7th American edition, and notes; reported originally in 8 Reports, 432, 146*.

† Purrington v. Loring, 7 Massachusetts, 388; Pierce v. Benjamin, 14 Pickering, 356; Smith v. Gates, 21 Id. 55; McGough v. Wellington, 6 Allen, 505; Blake v. Johnson, 1 New Hampshire, 91; Barrett v. White et al., 8 Id. 210; Ferrin v. Symonds, 11 Id. 363; Cate v. Cate, 44 Id. 211; Sutton v. Beach, 2 Vermont, 42; Stoughton v. Mott, 13 Id. 175; Bond v. Wilder, 16 Id. 393; Lamb v. Day et al., 8 Id. 407; Briggs v. Gleason, 29 Id. 78; Hall v. Ray, 40 Id. 576.

perishable nature. The scheme adopted for the condemnation of property of this limited value, without a resort to the courts, could not be complete unless it embraced property liable to deteriorate, as well as that which was not of this character. And of necessity, the provisions for the condemnation of both could not be the same. Perishable property ought to be speedily sold, while property not in this condition could not be injured by delay. The statute recognizes this difference, and provides for it. In the case of property not perishable—doubtless, supposed to be the kind which would usually come under condemnation—the first step to be taken is to give notice of the seizure, which is to be continued for three successive weeks. If the owner appears in twenty days from the first publication of this notice, he can put a stop to the summary proceeding. If he does not appear, the property is to be advertised for sale on notice of not less than fifteen days. And he is turned over to the Secretary of the Treasury for remission of the forfeiture, if he has suffered injustice at the hands of the government.

The requirements concerning the disposition of perishable property are very different. In the first place, no separate notice of seizure is exacted of the officer, but the notice of seizure is to go out with the notice of sale. This provision shows that it was intended to hasten the sale of this kind of property; and it is clear that this object could not be attained if the officer had to publish a preliminary notice of seizure, wait twenty days for any one interested to prefer a claim, and then advertise and sell. Before all this could be done, the property might become worthless. At any rate, the longer the delay the greater the deterioration; and in recognition of this fact, the officer is authorized to sell property in this predicament in a week, if he thinks proper to do so; while, as we have seen, he is estopped from selling property not in this condition until the expiration of thirty-five days from the publication of notice of seizure. In the latter case, the owner can have twenty days to file his claim, and yet the officer can discharge his duty under the law; in

the former he cannot enjoy this privilege and the officer be allowed to exercise his discretion to sell the property after a week's notice.

The two things cannot coexist, nor is Congress chargeable with such loose legislation, for the condition can be construed so as to harmonize all parts of the section, and thereby secure an effective system for the speedy disposition of property subject to forfeiture, of less value than $500, whether perishable or not.

It is argued that the words "as hereinbefore provided" control the condition, and make it broad enough to embrace everything secured on this subject in a previous part of the statute. This result by no means follows. The words, it is true, are general, but they necessarily refer to the manner of making the claim as previously directed, and not to the time within which the claimant of property, not perishable, could interfere.

The twelfth section pointed out the way in which the party interested had to proceed in order to arrest the sale of his property. He must file his claim with the officer, state the nature of it, and give bond with certain conditions. If these things were done, the summary proceeding was stopped, and the district attorney authorized to proceed to condemn the property in the ordinary mode prescribed by law.

By the fifteenth section, the owner of perishable property was informed that if he interposed and perfected his claim in the same way, the same consequences would follow. If he did not choose to do this, the officer was directed, without any loss of time, to advertise and sell his property, leaving him, in case of injury, to seek redress at the hands of the Secretary of the Treasury.

This is the scope and extent of this section. On this theory of construction the plan adopted for the sale of perishable property can be made to work effectively. On the theory advanced by the plaintiff, it is practically inoperative.

It follows, from these views, that the demurrer to the special plea in bar should have been overruled, and that,

therefore, the question certified by the judges below must be

ANSWERED IN THE AFFIRMATIVE.

UNITED STATES v. HENRY.

1. An officer who shows that he received a commission from the proper source, and who serves and is recognized as such officer by his superiors until his regiment is mustered out, and who presented himself at the proper time and place to be mustered in, and was refused, makes out a *primâ facie* case for full pay under the joint resolution of Congress of July 26th, 1866, "for the relief of certain officers of the army."
2. It does not rebut this *primâ facie* case to prove that the officer who refused to muster him in *alleged* that he was not entitled to such muster, because the company to which he was assigned as lieutenant was below the minimum in numbers.
3. Such a statement is not a finding of the fact by the Court of Claims that the company *was* reduced below the minimum.
4. Nor does the fact, if found, bring the case within section twentieth of the act of March 3d, 1863, forbidding the appointment of officers to a regiment when that *regiment* has been reduced below the minimum number allowed for regiments.

APPEAL from the Court of Claims; the case being thus:

A joint resolution of Congress, approved July 26th, 1866,* resolves:

"That in every case in which a commissioned officer actually entered on duty as such commissioned officer, but, *by reason of being killed in battle, capture by the enemy, or other cause beyond his control*, and without fault or neglect of his own, was not mustered within a period of not less than thirty days, the pay department shall allow to such officer full pay and emoluments of his rank from the date on which such officer actually entered on such duty as aforesaid, deducting from the amount paid in accordance with this resolution all pay actually received by such officer for such period."

An act of Congress of prior date, March 3d, 1863,† had enacted in its twentieth section,—

* 14 Stat. at Large, 868. † 12 Id. 734.

"That wherever a *regiment* is reduced below the minimum number required by law, no officers shall be appointed in such *regiment* beyond those necessary for the command of such reduced number."

In this state of statutory law, Anthony Henry, who had been duly commissioned as *second lieutenant* in the second regiment of Ohio volunteer infantry by the governor of that State—which commission he accepted on the 15th day of August, 1863—and who actually served and performed the duties of that office from that day until October 10th, 1864 (when he was mustered out of service with his regiment), and was during all that time recognized as such officer by his superior officers, and commanded the company in several battles, but had been paid only the amount due to the rank and service of *first sergeant of infantry*—filed a claim in the court below against the United States for $1118, the pay and allowance due to a second lieutenant.

The Court of Claims found as facts,

"That upon receipt of his commission from the governor of Ohio, the claimant presented himself for muster, as second lieutenant, to the proper mustering officer of his division, but was refused such muster, the mustering officer *alleging* that Company D, to which the claimant was assigned, was reduced below the minimum number, and that, therefore, he was not entitled to be mustered; that the claimant repeatedly offered himself for muster to the proper officer during the time aforesaid, but without success; and that he was always ready and anxious to be so mustered, and that his failure to be so mustered arose from a cause beyond his control, and without fault or neglect of his own."

The Court of Claims found in favor of the claimant, and decreed to him a second lieutenant's pay. The United States appealed.

Mr. C. H. Hill, for the United States:

As the company to which the claimant belonged was reduced below the minimum number, the act of March 3d, 1863, passed prior to the joint resolution, forbade his being

mustered. And it is not to be supposed that the joint resolution was meant to be applied to a case where the party could not be mustered in without a violation of law.

In addition to this, applying the ordinary rule of interpretation, that general words are to be construed as *ejusdem generis*, it would seem to be clear that the other causes referred to in the resolution are causes similar in nature to those particularly mentioned, namely, by reason of being killed in battle, or capture by the enemy.

Messrs. N. P. Chipman and A. A. Hosmer, contra:

The reason why Henry was refused pay for his services as lieutenant, was that he had never been mustered into the service as a lieutenant. But he offered himself repeatedly for such muster, and produced his commission. He came, therefore, within the provisions of the joint resolution, since he entered on the duties of the office and performed the same, and his failure to be mustered in was "without fault or neglect of his own," and was from a cause "beyond his control."

Mr. Justice MILLER delivered the opinion of the court.

There is no question but that the claimant's case comes within the strict letter of the joint resolution.

The counsel for the United States, however, argues that the joint resolution can only have application to the case of an officer duly commissioned and *entitled by law to be mustered into service as such officer*, and that the finding of the court shows that the claimant was not entitled to be mustered in when he accepted his commission and offered himself for that purpose.

This would raise a very interesting question, and one which might not be easy of decision, if the record in this case fairly presented it. There is undoubtedly strong reason why Congress should have provided full pay for an officer who, holding a commission from the proper source, was given command and actually served as such officer, and had his rank recognized by all his superiors, though in point of

fact not mustered in as such or entitled to be; and it is certain he would not be entitled to such pay without the enabling act. But we do not find in the record the evidence, or any finding of the court that the claimant was not entitled to be mustered into the service. The finding of the Court of Claims on that subject is as follows:

"Upon receipt of the commission from the governor of Ohio the claimant presented himself for muster, as second lieutenant, to the proper mustering officer of his division, but was refused such muster, the mustering officer alleging that Company D, to which the claimant was assigned, was reduced below the minimum number, and that, therefore, he was not entitled to be mustered."

Counsel for the government, assuming that what the mustering officer alleged is to be treated here as an established fact, further assumes that that fact brings his case within the language of section twenty of the act of March 3d, 1863, to wit: "That whenever a *regiment* is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number."

But the argument is open to more than one fatal objection.

1. The claimant having shown that he was regularly commissioned and served as a lieutenant, and was, without fault of his, refused a muster, so that he comes within the literal terms of the joint resolution; if any fact is relied on to defeat his claim, it should be specifically found and stated by the Court of Claims. This is not done by a finding of that court that the mustering officer *alleged* that Company D was reduced below the minimum number. If the fact that the company was below the minimum was important in the case, it should have been found as a fact by the court, and not stated merely as the alleged reason of the officer for refusing to muster in the claimant. The muster-roll of the company was within the control of the government, and would have settled the fact, one way or the other, beyond dispute.

2. The act relied on by counsel forbids the appointment of officers in a *regiment*, when it is reduced below the mini-

mum number allowed by law, beyond those necessary for the command of such reduced number.

It is quite consistent with a reduction of Company D below the minimum for a company, that the regiment was not below the minimum for a regiment. Indeed, it is unreasonable to suppose that because a single company is reduced below the minimum, that the regiment is for that reason to be so treated, and to have no more officers appointed in it until that company is filled up.

There is no finding, nor any allegation, in the present case, that the regiment was below the minimum, and, therefore, this act does not apply. Nor are we pointed by counsel to any law or regulation of the service which fixes what is the minimum of a regiment of volunteer infantry. Nor does the Court of Claims find any facts from which, if we had such a law or regulation before us, we could decide whether this regiment, or, indeed, this company, was in fact below the minimum as established by law at the time the claimant offered himself for muster.

Under these circumstances, the judgment of the Court of Claims must be

AFFIRMED.

REED v. GARDNER.

In passing upon the questions presented in a bill of exceptions this court will not look beyond the bill itself. The pleadings and the statements of the bill, the verdict and the judgment are the only matters that are properly before it. Depositions, exhibits, or certificates not contained in the bill, cannot be considered by the court. The court declares its intention to adhere to what is above presented as its practice; and declares further that the case of *Flanders* v. *Tweed* (9 Wallace, 425), was exceptional.

ERROR to the Circuit Court for the Southern District of Georgia.

Gardner sued Reed in the court below. His declaration alleged that one Wilson had delivered to the defendant cotton, upon an agreement that he, the defendant, would sell

the same, and out of the proceeds pay to him, Gardner, the plaintiff, $4000, in which sum the said Wilson was indebted to Gardner; that the property was sold, that the net proceeds were $9000, by means whereof the defendant became liable to pay to the plaintiff the $4000, and that he refused to pay the same. To this the defendant interposed a general denial and several special pleas. A trial was had, and verdict and judgment having been given for the plaintiff, the defendant brought the case here.

The bill of exceptions contained no statement of the evidence, or of the facts upon which the questions arose. It consisted only of the charge of the judge, and of requests and refusals to charge. There was, however, in the transcript a number of depositions, exhibits, certificates, &c., which appeared to have been used in the trial of the case.

Messrs. Carlisle and McPherson, for the plaintiffs in error, stating a case shown, as they conceived, by these, sought to show on it, that there had been error in the action of the court below.

Mr. W. W. Boyce, contra, argued that striking out the depositions, exhibits, certificates, &c., improvidently incorporated in the transcript, no such case as the counsel sought to put before the court was found in what remained, the true record, *i. e.*, the pleadings, bill of exceptions, verdict, and judgment; and asked for an affirmance.

Messrs. Carlisle and McPherson replied that it could not be doubted that such evidence as was contained in the depositions, exhibits, certificates, &c., had been, in fact, given, and that the charge of the judge was based upon it; and suggested that if this court should think that the evidence was not put into the record in proper form, then, that, as in *Tweed* v. *Flanders*,* the judgment should be reversed and the cause remanded for a new trial; this course being more

* 9 Wallace, 425, 432.

conducive to justice than to affirm a judgment in a case where it plainly appeared that the court mistook the law, though the mistake might not be so presented as to be capable of being corrected by this court.

Mr. Justice HUNT delivered the opinion of the court.

It has been frequently held by this court, that in passing upon the questions presented in a bill of exceptions, it will not look beyond the bill itself.* The pleadings, and the statements of the bill, the verdict, and the judgment, are the only matters that are properly before the court. Depositions, exhibits, or certificates not contained in the bill, cannot be considered by the court. The case of *Flanders* v. *Tweed*, was exceptional. The court intend to adhere to this practice.

Under this rule there is then nothing whatever in the present case for the court to pass upon.

It is impossible upon a record such as this is, that we should know whether the charge is correct or erroneous, or whether the refusals to charge as requested were justified, or whether they were improper.

As already said, there is absolutely nothing presented to this court for consideration.

JUDGMENT AFFIRMED.

RAY v. SMITH.

1. Although it may be conceded that notice of demand and non-payment of a note need not be given to an indorser who has received funds from the maker, indisputably and only for the purpose of paying the note whenever presented (an indorser in such a case becoming liable as a principal debtor), yet as such a rule does not apply when the indorser having funds of the maker has them not in that way, but only from the profits of a business in conducting which he was a partner of the maker, and is simply authorized to apply the funds so in his hands to the pay-

* Norris v. Jackson, 9 Wallace, 125; Lincoln v. Claflin, 7 Id. 186; Leftwich v. Lecanu, 4 Id. 187; Russell v. Ely, 2 Black, 580.

Statement of the case.

ment of notes *at* their maturity, and thus may have parted with them a certain time *after* the maturity,—in such a case it is error to take away from the jury the question whether the note was legally presented to the maker for payment, and whether notice of dishonor was legally given to the indorser. The most that in such a case can properly be asked by the holder of the notes, is that the evidence should be submitted to the jury to find whether it proved that the defendant had become the principal debtor by arrangement between him and the maker, with instructions that if it did, the plaintiff was entitled to recover; and that if it did not, the indorser could not be held liable without proof of reasonable demand upon the maker, and notice.

2. Though a party may have taken exception before a trial to the refusal of a court then to suppress a deposition, yet if he allow the deposition to be read on the trial without opposition, he cannot avail himself, in this court, of his previous exception.

ERROR to the District Court for the Middle District of Alabama; the case being thus:

Smith, in November, 1866, sued Ray in the court below as the indorser of two negotiable notes, made by one Harkaway. The notes were both dated April 12th, 1861, and were made payable at the Bank of Mobile, one on the 1st day of March, 1862, and the other on the 1st day of November, in the same year. Both the maker and the indorser were then, and continued to be, citizens of the State of Alabama; and the holder of the notes was, and continued to be, a citizen of the State of New York. When the notes fell due in 1862, they were not presented for payment, in consequence of the war of the rebellion then existing, but they were presented in 1866, a certain time after the close of the war, and were dishonored. Notice of the dishonor was then given to the indorser.

The plaintiff alleged, in his declaration, as an excuse for the non-presentation of the notes at the time when they fell due, the existence of the civil war, and the residence of the holder in the State of New York, and that of the maker and indorser in Alabama, regions then at war with each other; and alleged further that he had presented the notes and given notice of the dishonor within a reasonable time after the termination of the war, specifying the date of the presentation, &c. The defendant set up that the date named

was not reasonable in point of time. And evidence was given as to when the war ended and intercourse was resumed; when the notes could have been presented, and when they were in fact presented.

A portion of the evidence (descriptive of the course of business out of which the claim arose) was derived from a deposition of the plaintiff, taken *de bene esse*, which before the trial the defendant had moved to suppress. The court on this motion refused to suppress it. An exception was taken to this refusal, but on the trial it was read without objection.

It appeared in evidence that the maker of the notes, and Ray, the indorser, were partners in a business which was actively conducted by Ray; that after the notes were indorsed to the plaintiff, and before their maturity, Ray had in his hands of the profits of the business, belonging to the maker, a sum larger than the amount of the two notes; that this sum remained in his hands until after the notes matured, and that he was authorized to apply it to their payment, at their maturity. But it also appeared that he could not find the notes at their maturity, nor until the spring of 1866, at which time, as already said, they were presented to the maker for payment, and that before they were thus presented, the maker had instructed the defendant to apply the sum in his hands to the payment of other debts, which the defendant had done.

The court charged:

"If there were no evidence in this case that the maker of the notes in suit had provided the indorser with funds to discharge them at maturity, then the question whether the notes were legally presented for payment, and the question whether legal notice of protest was given to the indorser, would have had to be submitted to the jury. The evidence on this point is that Ray was provided by the maker of the notes with the means of indemnifying himself against his indorsement. He need not have parted with these means until the notes were paid and in his possession. He chose to do so, however, and cannot now complain of the want of demand on the maker, or notice of

protest to himself. I therefore direct your verdict for the plaintiff for $1124.50, with interest thereon from the 4th March, 1862, and for $1124.50, with interest thereon from the 4th November, 1862."

To this charge the defendant excepted, and offered to state to the court the grounds of his exceptions; but the court refused any such statement.

Messrs. R. T. Merrick and S. F. Rice, for the plaintiff in error, insisted:

1st. That the court had taken the case improperly from the jury.

2d. That it had improperly refused to suppress the deposition before the trial.

Mr. P. Phillips, contra.

Mr. Justice STRONG delivered the opinion of the court.

Whether timely presentment of the notes was made to the maker, and whether due notice of their dishonor was given to the defendant who had indorsed them, are questions which were not submitted to the jury. The court below appears to have been of opinion, that in view of the facts given in evidence, neither demand of payment nor notice to the indorser was necessary to justify a recovery against him. The jury was instructed in substance, that even if there was no legal demand and notice, the want of them was sufficiently excused; and that the plaintiff was entitled to a verdict for the amount of the notes with interest from the dates when, according to their terms, they fell due. It is necessary, therefore, to inquire whether the evidence, as exhibited in the bill of exceptions, warranted such instructions.

It is undoubtedly the law, that though the plaintiff was relieved by the war from obligation to make demand upon the maker of the notes when they came to maturity, it was necessary for him, in order to charge the indorser, to make such demand within a reasonable time after it became pos-

sible; that is, after the close of the war; unless he was excused by the fact that the indorser had sufficient funds of the maker in hand, which he had received in the course of a current business, and which he had authority to apply to the payment of the notes at their maturity. And whether that alone constituted a sufficient excuse, is the real question now.

An indorser of a promissory note is only secondarily liable. His responsibility is, in its nature, a contingent one, and ordinarily, performance of the condition to make demand of the maker and give notice of his default in due time is an essential part of the title of one who asserts an indorser's liability. It has often been regretted that courts have dispensed with the performance of that condition for any cause. Still, the principal reason for the requirement of demand and notice is, that the indorser, if looked to for payment, may have the earliest opportunity to take steps for his own protection. Hence, it has been said, in some cases, that when by no possibility a failure to make demand and give notice could have injured him, or rather, when they could by no possibility have enabled him to protect himself, proof of demand and notice are not necessary. It must be admitted there has been much inconsistency in the decisions respecting the application of this rule. In some, it has been held that if an indorser has taken an indemnity from the maker, he is not entitled to notice of default. But this is not sustained by sound reason, and the best-considered cases assert the contrary doctrine. The indemnity may prove insufficient. At all events, it is not inconsistent with the existence of a remedy over against the maker, and the correct rule, as stated by Bailey, J., in *Brown* v. *Maffey*,* is that every indorser ought to have notice whenever he has a remedy over. All the cases agree, however, that when, by arrangement between the maker and the indorser, the latter has become the principal debtor, and primarily liable, he may not insist upon notice. Presentment to the maker fol-

* 15 East, 222.

lowed by notice to himself can be of no service to him, for he has no remedy over. And he becomes the principal debtor when, either before or at the maturity of the note, he is supplied by the maker with sufficient funds for the purpose of paying it. Receiving the funds for such an avowed purpose, he assumes an obligation to take up the note; and, as has been said, he may be regarded as an agent who has undertaken to pay, and who, therefore, cannot be disappointed if his principal, trusting to his obligation, takes no further steps for the payment.

In the present case, the evidence does not necessarily establish that the funds which the indorser held were placed in his hands for the purpose of paying the notes. They were derived from the profits of the business, in conducting which he was a partner of the maker; and he was merely authorized to apply them to the payment of the notes, at their maturity. Whether this proved the existence of an obligation assumed by him to take them up, or in other words, whether, as between him and the maker, he thus became the primary debtor, is a question which the court could not correctly answer in the affirmative as a conclusion of law. If it did establish such an obligation, absence of demand and notice were immaterial, and the plaintiff was entitled to a verdict. But if it did not, if the indorser, as between himself and the maker, had not become the principal debtor, if the authority to pay the notes out of the fund in his hands was only an arrangement for his indemnity, we think he was at liberty to pay them to the maker at any time after the maturity of the notes, and before he had any notice that they remained unpaid. In such a case, his liability to the holder remained contingent, and consequently, unless there was a legal demand and notice, he cannot be charged. It follows, that the judge of the court below erred in directing a verdict for the plaintiff. The most that could properly be claimed by the holder of the notes, was that the evidence should be submitted to the jury to find whether it proved that the defendant had become the principal debtor by arrangement between him and the maker, with instruc-

tions that if it did, the plaintiff was entitled to recover; and that if it did not, the indorser could not be held liable without proof of reasonable demand upon the maker, and notice.

Nothing more need be said respecting the charge given to the jury. But as the case goes back for another trial, it is proper to notice an exception taken to the refusal of the court to suppress the deposition of the plaintiff. The deposition had been taken *de bene esse*, and before the trial the defendant moved to suppress it. But when it was offered at the trial, it was read without objection, and without exception. It may be that had it been objected to then, it should not have been received. But after having permitted it to be read at the trial without opposition, we think it cannot be objected now that the court received it.

JUDGMENT REVERSED, AND A NEW TRIAL ORDERED.

MOORE *v.* HUNTINGTON.

1. The court reverses a decree where the court below affirmed a report of a master finding (on evidence not competent, and in the face of answers by surviving partners responsive to a bill) that the interest of a complainant's intestate in a partnership was one-third, the answers averring that it was but one-eighth.
2. Where a person sues in chancery as administrator of a deceased partner, to have an account of partnership concerns, alleging in his bill that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties: since a decree in his favor as administrator would not interfere with the rights of others who might claim a distribution after the complainant received the money decreed to him.
3. Where a cross-bill and answers are filed in a case and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them.
4. It is not error in an appellate State court giving judgment against an appellant to include in the judgment sureties in the appeal and writ of error bond. By signing the bond they become voluntary parties to the bond and subject themselves to the decree.
5. On a bill by the representatives of a deceased partner against surviving partners for an account, these last should not be charged with the sum which the partnership assets at the exact date of the deceased partner's death were worth, but only with such sum as by the use of reasonable

care and diligence they could get for them in closing the partnership business.

6. Nor should they be charged with the value of real estate of the partnership the title to which is left by the decree charging them in the heirs of the deceased partner.

APPEAL from the Supreme Court of the Territory of New Mexico.

Mrs. Huntington, widow by a former marriage of Nathan Webb, and administratrix of his estate, brought this, a suit in chancery, against W. H. Moore and W. C. Mitchell, as surviving partners of a firm of which her husband, whose sole heir by the laws of Texas she alleged herself to be, was a member at the time of his death. The object of the bill was to obtain a settlement of the partnership transactions, and she alleged that a large sum was due her on such settlement.

It admitted of no doubt that Moore and Mitchell, who had been doing business at Fort Union, in New Mexico, as post sutlers and general merchants, prior to 1859, in that year took into their partnership the decedent, Webb, who had previously been one of their clerks; and that in the year 1863 they started a business in Southern New Mexico and El Paso, Texas, which was placed under the especial charge of Webb.

It was also agreed that in regard to this latter business Moore, Mitchell, and Webb were equal partners, the interest of Webb being one-third.

In reference to the business at Fort Union the complainant alleged in her bill that her husband, on joining the partnership, put into its capital stock $16,000, and was taken in as an equal partner, and that written articles of agreement to that effect were signed by the parties. The defendants, Moore and Mitchell, who were required to answer under oath, did so, and while admitting the partnership, denied that Webb put in any capital, and averred that he was taken in for his business qualities. They denied that any articles of agreement were made or signed in writing, and they denied that his interest was one-third, and alleged that it was to be one-eighth.

As the transactions of the Fort Union branch of the concern were much the largest, and as nearly all the profits claimed by the complainant were made here, the difference was important.

The defendants denied also that the complainant was sole heir of their late partner, and asserted, contrariwise, that he had left, surviving him, his mother, who had an interest in his estate, and was a proper and necessary party, without whom the cause could not proceed.

The defendants filed a cross-bill against the complainant, which she answered.

No written articles of partnership as to the Fort Union business were produced or shown to have been made. One *Shoemaker*, father of the complainant, and "very intimate with Moore," testified in 1870 that in 1862 Moore had told him, "as near as the witness could recollect," that "all the partners were jointly interested in the business of the firm. He never stated that the interests of the members were equal; neither did he ever state that they were not equal until a year and a half after Webb's death; and I never, until that time, heard anything to raise a doubt of Webb's equal interest." *Houghton*, a brother-in-law of Webb, stated that he "had frequently heard Webb say, and at various times and places, that he was a full and equal partner in both concerns, and in all the various branches and ventures of the firm at Fort Union. On one occasion he referred to the equality of their interests in the counting-room of the sutlers' fort." "To the best of my recollection," said the witness, "W. H. Moore was in the room. He took no part in the conversation, and I am not aware whether he heard what was said or not." For the rest, the evidence as to the extent of Webb's interest in the firm at Fort Union, rested chiefly on the bill and answers.

The case being referred to a master, he held that the interest of Webb was one-third, and on this basis reported $97,596.19 due by the defendants; charging the defendants in such a way that, as his report seemed to indicate, they were charged as to some items twice for the same thing;

charging them with property at the value *which it had at the date of the decedent's death*, and charging them with real estate the title to which was still in the decedent.

Sixteen exceptions to this report were filed by the defendants. Certain particulars of the report, and exceptions to them respectively, which were taken, are stated further on, in the opinion of this court in passing on them. They are, therefore, not more fully given here.

The Supreme Court of New Mexico, to which the case was taken on appeal from the District Court of the Territory, where it originated, reduced, "for errors apparent on the record"—though for what errors did not anywhere appear, nor on account of which of the sixteen exceptions filed—the sum found by the master to $72,920.75, and "in all other respects" affirmed it, and for the amount of $72,920.75; including in its affirmance, of course, the fundamental part by which the master assumed that Webb's interest in the Fort Union firm was one-third. In giving its decree of affirmance the Supreme Court adjudged that the complainant (appellee in the case before it) should have judgment against the securities in the bond for an appeal to that court, for the amount of the judgment, interest, and costs.* The

* The compiled laws of New Mexico (page 290, § 5) enact that—

"In case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities on the appeal bond."

This section of the act of the Territory of New Mexico was founded, according to the allegation of the appellant's counsel, on what is known as the Kearney Code; an enactment made by General Kearney, September 22d, 1846, four years prior to the organization of the Territory of New Mexico, under the act of Congress of 9th September, 1850 (9 Stat. at Large, 446). And when the act was passed, it was applicable, as the said counsel conceived, only to the courts of justices of the peace and probate courts existing and doing business at the time as courts. They conceded, however, that in "*The Beal Case*," then just decided by the Supreme Court of New Mexico, it was held that—

"A statute authorizing judgment against the securities on appeal bond, as well as against the appellants in case of affirmance, is not unconstitutional."

"The correctness of this ruling," they added, "where *a statute is in existence so providing*, it is not worth while to discuss as a general proposition."

The Reporter did not understand whether the Supreme Court of New Mexico regarded that the statute was in existence or not.

cross-bill was not in any manner referred to, and remained undisposed of.

The defendants now appealed to this court, assigning very numerous errors, and among them—

A disregard of the proofs in the matter of Webb's interest in the Fort Union firm; the fundamental matter of the suit.

A want of necessary parties, in the omission of the mother as one.

Decreeing finally upon the complainant's bill and the respondents' answers, without disposing at the same time of the issues raised upon the cross-bill.

Making a decree against the sureties in the appeal bond.

Double charges in the master's report.

Charges on wrong principles, as *ex. gr.* (*a*) of the estate at its value at the date of the decedent's death; (*b*) of real estate over whose title the surviving partners had no control.

Messrs. John S. Watts, W. M. Evarts, and J. W. Noble, for the appellants; Messrs. W. W. McFarland and S. B. Elkins, contra.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the ruling which decided the interest of Webb in the Fort Union branch of the concern to have been one-third was erroneous. No witness ever saw any articles of agreement. It is not contended now that any such were proved to have had an existence. No witness was ever present at any conversation between the partners on that subject. One witness, a brother-in-law of Webb, states that he heard Webb say he was an equal partner in the business, which statement was made while Moore was in the room where it was said, but he cannot say that Moore heard it, or that it was said in his immediate presence. Other declarations of the decedent are proved to the same effect, but they are not competent evidence. The statements of Moore and Mitchell are explicit responses to allegations which they are called on to answer, and they are unshaken by anything in the record. It must be held that

the interest of Webb in the Fort Union branch of the business was only one-eighth.

This necessarily reverses the decree, but other points demand attention.

It is asserted that the suit cannot proceed because the mother of decedent is not made a party, as she is one of his heirs-at-law. But this is not a suit for distribution, and although the complainant does assert herself to be sole heir, her suit may, nevertheless, be sustained as administratrix, in which right she also complains. A decree rendered in her favor in that capacity would not interfere with the rights of others who might claim of her a distribution after she received the money. That objection is not, therefore, tenable.

A cross-bill was filed by defendants against complainants, which was answered. No notice was taken of it in the final decree, which should have been done, though the court undoubtedly supposed it was disposing of the whole case. On the return of the case this may be corrected, and if on the next hearing the plaintiffs in the cross-bill are entitled to any relief, the pleadings are a sufficient foundation for a decree in their favor.

The master presented two schedules or separate statements of the two branches of the business. The Texan and Southern New Mexico venture he styles the firm of N. Webb & Co., and the original partnership W. H. Moore & Co. To this there seems to be no objection. Numerous exceptions were taken to his report, which were overruled, and a decree for $97,596.19 was rendered in favor of complainant. This sum was reduced on appeal to the Supreme Court of the Territory by the sum of $24,675.44, and a final decree rendered there for the remainder. But on what ground this deduction was made, or to what exception it is referable, does not appear.

The decree was rendered in the Supreme Court jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter. But there is no error in this. It is a very common and useful thing to provide by statute

that sureties in appeal and writ-of-error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit and subject themselves thereby to the decree of the court.

Other exceptions to the report of the master, of considerable value in amounts, seem to us to be well taken.

1. In the schedule which refers to the business of N. Webb & Co. the assets are charged to defendants at $78,879.16 for goods, wares, and merchandise, and $76,103.03 for debts due and owing to the firm.

Immediately after this the defendants are charged in items Nos. 3, 4, and 5 with cash received by W. H. Moore of $10,258.75, $8166.70, and $2000.

It seems to us that these items are for money received on account of assets already charged, or for debts collected already charged, and are, therefore, twice charged against defendants.

2. So in the schedule of W. H. Moore & Co., the goods on hand at Fort Union July 2d, 1866, are charged to defendants at $182,656.71 and debts due the firm at $322,958.77.

Looking to the exhibit in the answer of Moore, on which this estimate is based, it is quite clear that in this latter sum, the item of $101,330.95, due by Moore, Adams & Co., is for all or a part of the goods charged in the first item of $182,000, purchased at the time that inventory was taken, and counted afterwards as part of the assets of the old firm. It is thus charged twice against defendants.

3. The defendants are credited in the schedule of N. Webb & Co. with fifty per cent. of the debts due the firm, after deducting what Webb and his wife owed that firm, and in the other schedule they are credited with $100,000, both for bad debts. This may or may not do justice, and it may possibly be the only approximate mode of doing it. But it goes upon the ground of charging the defendants with everything at the date of the decedent's death at its value at that time. Such is not the true rule. It was a legal right

of the defendants, as surviving partners, to close out the concern, collect and dispose of its choses in action, and its property, pay what it owed, and then pay over to the plaintiff her just share of what was left. They were not bound to become purchasers of the decedent's interest at a valuation. But they were bound to use reasonable diligence and care in closing out the business, and in taking care of the decedent's interest. If they used such care and diligence they are only liable for what was realized in their hands when it was done. If they did not they are liable for what might have been realized by the use of such care and diligence. In this latter view it is not now possible to say with accuracy what the state of the account should be, and it is the duty of the master to ascertain this and make proper report on this point as well as others.

4. Again, while the defendants are charged with the value of certain real estate of the partnership, the title of it, which is in the plaintiff, is left there by the decree.

In short, the basis of the account being entirely erroneous in assuming the interest of Webb at one-third instead of one-eighth in the partnership of W. H. Moore & Co., and considering the loose and unsatisfactory character of the whole report, among which are doubtless other errors than those above mentioned, it is utterly insufficient as a foundation for any decree. Nor can we here undertake, with no other report, to render one with which we would be satisfied.

It is, therefore, ordered and decreed that the decree of the Supreme and District Courts be REVERSED; that the case be remanded with directions to set aside the entire report of the master; that a new master be appointed, with directions to adjust the accounts on the basis of an interest of one-eighth in Webb in the Fort Union branch of the business, and one-third in the other, and that such adjustment be made in conformity with this opinion, so far as it can serve for a guide, and that the final decree to be rendered in the case shall be a full settlement of all the matters litigated in the bill, cross bill, and answers.

STATE v. STOLL.

If the provisions of a special charter or a special authority derived from the legislature, can reasonably well consist with general legislation whose words are not absolutely harmonious with it, the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case.

Where a State had publicly promised that the notes of a bank in which it was the sole stockholder, and for whose bills it was liable, should be taken in payment of taxes and all other debts due to the State, and so impressed the credit of the State upon the notes: *Held*, that when the State afterwards intended to terminate this obligation (as it could do upon reasonable notice as to after-issued bills), it was bound to do it openly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be a proper one for the purpose, so it was not to be imputed.

The court construes different sections of the statutes of the State of South Carolina relating to the banks of that State, and holds—under the sixteenth section of the charter of the bank known as "the President and Directors of the Bank of the State of South Carolina," or more briefly "the Bank of the State," (which enacted "that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable in all payments for taxes or other moneys due the State")—that the bills of the bank, although issued after December 20th, 1860, were a legal tender for the payment of taxes due the State in 1870, notwithstanding the fact that the bank at the time of their presentation did not redeem its notes in specie, and notwithstanding that in 1843 the legislature had enacted that "all taxes for the service of the State shall be paid in specie . . . or the notes of specie-paying banks."

ERROR to the Supreme Court of the State of South Carolina; the case being thus:

Between the years 1801 and 1812 the legislature of South Carolina incorporated five banks, viz., the Bank of South Carolina, in 1801; the State Bank of South Carolina, in 1802; the Union Bank, and the Planters' and Mechanics' Bank, in 1810, and "the President and Directors of the Bank of South Carolina," called for brevity THE BANK OF THE STATE OF SOUTH CAROLINA, and sometimes THE BANK OF THE STATE, in 1812.

The preamble to the act of incorporation of this last-

named bank set forth that "it is deemed expedient and beneficial to the State and the citizens thereof to establish a bank on the funds of the State, for the purpose of discounting paper and making loans for longer periods than has heretofore been customary, and on security different from what has hitherto been required."

The charter then declared that certain stocks, which were designated, should constitute and form the capital of the said bank, and be vested in the president and directors, who should be appointed in a manner there provided, and then adds:

"And the faith of the State is hereby pledged for the support of the said bank, and to supply any deficiency in the funds specially pledged, and to make good all losses arising from such deficiency."

The sixteenth section of the charter to this bank provided, as did also the same section in the charters of the four other banks above referred to, as incorporated in previous years,

"That the bills or notes of the said corporation, originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State."

In 1832 the bank last named (the Bank of the State), and of which we are principally to speak, was rechartered by an enactment,

"That an act entitled an act to establish a bank in behalf of, and for the benefit of the State, passed on the 19th December, in the year of our Lord 1812, and all other acts now of force relating to the conduct and operations of the said bank, be, and they are hereby, re-enacted and continued of force until the 1st May, 1856."

In 1852 the charter was again renewed in these terms:

"That from and after the expiration of *the present charter* of the Bank of the State of South Carolina, *the same* shall be, and

is hereby extended until the 1st of January, which will be in the year of our Lord, 1871."

So the charters of the four other banks were at different times extended, and among the times of the first two in 1822 and 1833; and of the last two in 1830; and in all *these* extensions or recharters the privileges of the sixteenth section of making the notes receivable in payment of taxes, irrespectively of the fact whether the notes were redeemable in specie, were retained. We speak hereafter of a recharter of these four banks in 1852 and 1853, when these privileges were not retained.

In 1857, in the act to raise supplies for the year commencing in October, 1857, it is provided:

"That the comptroller-general shall direct the tax collectors and treasurers to receive the taxes and other dues to the State only in notes of the Bank of the State, OR of specie-paying banks of this State, or in coin of the United States."

In 1865 the legislature declared, that the branches and agencies of the Bank of the State of South Carolina should be closed, and the principal bank in Charleston cease to be a bank of issue, and continue to act as a bank of deposit until further orders of the legislature.

In 1868 the legislature passed an act to close the operations of the bank; and by the fourth section of the act enacted "that the sixteenth section of the act, ratified the 19th December, 1812, entitled 'An act to establish a bank on behalf of and for the benefit of the State,' and all acts and parts of acts which render the bills of said corporation receivable in payment of taxes and all other dues to the State, be, and the same are hereby repealed."

In the year 1843, that is to say, before the date of the second recharter above mentioned of the Bank of the State, the legislature passed an act "prescribing the duties of certain officers in the collection of supplies, payment of salaries, and for other purposes," and the first section of this act enacted,

"That all taxes for the use and service of the State shall be

paid in specie, 'paper medium,'* or the notes of specie-paying banks."

This was a permanent act. But in all previous years, with the exception of the year 1837, of which we speak directly, as far back at least as 1826, the same enactment had been introduced into each annual appropriation bill as a special enactment. In 1837, in which year there was a general suspension of specie payments throughout the United States, the enactment was:†

"That the taxes be paid in specie . . . or the bills of the banks of the State. And if any bank shall in the opinion of the comptroller-general become unsafe, it shall be his duty to order their reception to be discontinued by the tax collectors."

So far as regards the Bank of the State of South Carolina and the four other banks named in connection with it.

We now pass to certain banks incorporated in years of later date.

Between the year 1831 and the year 1836, seven of these banks were incorporated by the State, to wit: the Commercial Bank of Columbia, in 1831; the Merchants' Bank of South Carolina at Cheraw, in 1833; the Bank of Charleston, in 1834; the Bank of Camden, in 1835; the Bank of Hamburg, in the same year; the Bank of Georgetown, and the Southwestern Railroad Bank, in 1836. Except in the case of the one last named, the charters of each of these banks contained a section in the words following, viz.:

"The bills or notes of the said corporation, originally made payable on demand, or which shall have become payable, in gold or silver, current coin, shall be receivable by the treasurers, tax collectors, solicitors, and other public officers, in all payments for taxes, or other moneys due to the State, so long as the said bank shall pay gold and silver, current coin, for their notes; but whenever there shall be a protest on any of the bills

* This "paper medium" was a currency issued in 1785, of which it was supposed that some remnant might be outstanding.

† 6 South Carolina Statutes at Large, 584.

or notes of the said bank for non-payment of specie, the comptroller-general shall be authorized, and he is hereby required, to countermand the receipt of the bills and notes of the said bank in payment of taxes or debts due to the State, unless good and satisfactory cause shall be shown him, by the said corporation, for protesting in a court of justice the payment thereof."

The charter of the remaining bank was to the same effect, omitting the direction to the comptroller-general and his action thereon.

Reverting now to the five earlier banks and to recharters of them, the reader will remember that in the *re*charters of the Bank of the State of South Carolina, made, first in 1832 and again in 1852, "the same," the old charter of 1812—including, of course, the sixteenth section—was continued. And that the same thing was true of the four other banks, so far as related to their recharters as made in 1822, 1830, and 1833. But while in regard to the Bank of the State of South Carolina, no variation was made on the old charter during the active existence of the bank, nor until the legislature in 1868 passed the act to close its operations, the same was not true of the other four early banks which we have spoken of chiefly in connection with it. A variation was finally made on them. And when, *after* their recharters of 1822, 1830, and 1833, they were again rechartered in 1852 and 1853, the old sixteenth section was not re-enacted in regard to them, but they were made subject to the last above-quoted restriction of the later banks; the banks, namely, incorporated between the years 1831 and 1836.

In this condition of State legislation, one Wagner, who was indebted to the State for taxes for the year 1870, tendered to a certain Stoll, a collector of taxes, whose duty it was to collect and receive such taxes, in payment of his taxes, bills of the already mentioned "the President and Directors of the Bank of the State of South Carolina," or as more briefly called the Bank of the State of South Carolina, or Bank of the State. The bills were issued after December 20th, 1860,

though not in aid of the rebellion. At the time of their presentation the bank did not redeem its notes in specie. The officer refused to receive them, and Wagner presented his petition to the court below for a mandamus to compel him to receive the same.

The question in the case was the nature and extent of the obligation of the contract which, under the sixteenth section of the charter of the Bank of the State, arose between the State of South Carolina and the holder of bills of the bank to receive the bills in payment of taxes due the State.

It was asserted by Stoll, the tax collector, that the sixteenth section of the charter of the bank had been repealed or so far modified by the act passed in 1843—enacting* that "all taxes for the use and service of the State shall be paid in specie, paper medium, or the notes of specie-paying banks of this State"—that thereafter the bills of the bank in question were not receivable for taxes due to the State, unless the bank was in fact at the time the taxes became payable a bank that redeemed its notes in specie; the argument being that although by this sixteenth section of the charter of the bank the receivability of its notes in payment of taxes or other moneys due to the State, was guaranteed, whether they were or were not in fact redeemed in coin when presented for payment; yet that the act of 1843 prohibited the receipt in payment of taxes of the notes of any bank which did not in fact redeem its notes in specie when presented for payment, and that the latter act being inconsistent with the former effected its repeal or modification.

The Supreme Court of the State thought this argument sound, and adjudged that the tax collector of the State was not bound to receive them, and refused the mandamus.

To reverse that judgment this writ of error was taken. The case was twice argued: first at the last term, and now, again, much more fully at this.

Messrs. W. W. Boyce, A. G. Magrath, and B. R. Curtis, for the plaintiff in error; Mr. D. H. Chamberlain, contra.

* See *supra*, pp. 427–8.

Mr. Justice HUNT delivered the opinion of the court.

It is evident from a comparison of the different statutes incorporating the banks—1st, that as to all the banks, the statutory description of their notes to be received in payment of taxes, referred to the form of the notes, viz., those expressed upon their face to be payable in gold or silver, and which are originally or by lapse of time had become payable on demand, and not to the fact that specie was actually paid when the notes were presented for payment; and 2dly, that the legislature intended to provide that a different rule should be applied to the two classes of banks. In the case of the banks chartered between 1801 and 1812, it was simply provided that their bills should be received in payment of taxes and other moneys due to the State. In the case of those chartered between the years 1831 and 1836, it was provided that their bills should be thus receivable so long only as they should pay gold and silver, current coin, for their notes. The two classes of banks were thus confessedly placed upon a different basis, and so remained when the act of 1843 was passed.

To justify this court in holding that the act passed in that year repealed or modified the sixteenth section of the charter of the bank in question, it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.* The principle is thus expressed in *Daviess* v. *Fairbairn*:† "If a subsequent statute be not repugnant in all of its provisions to a prior one, yet if the latter statute clearly intend to prescribe the only rule which shall govern, it repeals the prior one."

Is it clear and certain that the act of 1843 was intended to prescribe the only rule to govern the receivability of bank

* Dwarris on Statutes, 530; Sedgwick on Statutes, 126; United States v. Tynen, 11 Wallace, 88, 92; Henderson's Tobacco, 11 Ib. 657.

† 3 Howard, 636, 643.

notes, and that a different rule was not intended to be applied to the banks chartered before 1812, and those chartered after 1831? Were not the words "the specie-paying banks," in the act of 1843, intended as a description of the banks then in existence, and which then actually paid specie on their notes, as if the act had said "all taxes . . . shall be paid in specie, . . . or the notes of the banks of the State now paying specie in conformity with their charter, to wit: the notes of the Bank of the State of South Carolina, the Union Bank, &c.?"

The statute-book shows that for many years prior to 1843, at each successive session, the legislature passed an annual supply bill, in which was regularly re-enacted the provision, that the taxes due to the State for that year should be paid in specie, paper medium (a currency now at an end), or in the notes of specie-paying banks. This was a temporary and annual act, and was enacted yearly at least as early as the year 1826, until and including the year 1842, with the exception of the year 1837. In the year 1837, it is said the banks were in a state of suspension, and the legislature enacted that the taxes should "be paid in specie, . . . or the bills of the banks of the State, and if any bank shall, in the opinion of the comptroller-general, become unsafe, so that its bills ought not to be received at the treasury, it shall be his duty to order their reception to be discontinued by the tax collectors."

In the year 1843 the provision above recited and so frequently adopted was re-enacted as a part of the general law of the State, and it was no longer embraced in the annual supply bill.

Whether contained in the annual supply bills or in the more durable form of the act of 1843, we are satisfied that that act was not intended by the legislature as a repeal of the sixteenth section of the act incorporating the Bank of the State of South Carolina.

To sustain this view, we refer to the acts extending the charter of the bank in question. It was chartered in the year 1812. Its charter expired in the year 1832, and was in

that year extended for a further term of twenty years. In the year previous, in the succeeding year, and in this same year, the legislature enacted the provision that "taxes should be paid in specie, paper medium, or the notes of the specie-paying banks of the State." It, however, re-enacted in its extended charter the provision that the notes of the Bank of the State should be receivable in payment of taxes, if payable in form in specie and on demand.

Again, in the year 1852, nine years after the passage of the act of 1843, the legislature for the second time extended the charter of this bank, including the original sixteenth section. If there be a conflict between these statutes, it might well be argued that the act of 1852 re-enacting the sixteenth section operated as a repeal of the law of 1843, so far as it related to this bank. Whether this be the case, or whether the two are to be continual as both continuing in force and as being applicable to different subjects, the result is the same, that the sixteenth section remains in force.

This view is further illustrated by the fact that the four other banks whose charters were granted prior to 1812, were extended without any alteration of their charters. Notwithstanding the yearly enactment that taxes should be collected in gold and silver, or the notes of specie-paying banks, the charters of the State Bank and of the Bank of South Carolina were extended in the year 1822, and those of the Union Bank and of the Planters' and Mechanics' Bank, in the year 1830, and again in 1833 the charters of the State Bank and the Bank of South Carolina were further extended; and in each instance the provision was retained making the notes receivable in payment of taxes without reference to the fact that their notes should be redeemed in specie. It is difficult to believe that the legislature intended the act of 1843 to act as a repeal or modification of these laws, some passed prior and some subsequent to that date.

It is evident, again, that the legislature of South Carolina, when they intended that the bills of non-specie-paying banks should not be received in payment of taxes, used language perfectly adapted to that purpose, and indicated the process

by which it would easily, but certainly, be accomplished. Thus, in the charters of the banks incorporated between the years 1831 and 1836, is found the provision already quoted, viz.: "That the bills or notes of said corporation originally made payable on demand, or which shall have become payable, in gold or silver, current coin, shall be receivable by the treasurers, tax collectors, solicitors, and other public officers, in all payments for taxes or other moneys due to the State, so long as said bank shall pay gold and silver, current coin, for their notes. But whenever there shall be a protest on any of the bills or notes of said bank, for non-payment in specie, the comptroller-general shall be authorized, and is hereby required, to countermand the receipts of the bills and notes of the bank, in payment of taxes and debts due to the State, unless good and satisfactory cause shall be shown him, by the said corporation, for contesting in a court of justice the payment thereof."

It is thus expressly enacted that its bills shall be receivable for taxes so long only as the said bank shall pay gold or silver current coin for its notes. A precise definition is given of what constitutes a failure so to pay, to wit, a protest for non-payment in specie of its notes or bills, and a mode is provided of precluding their further reception, to wit, the action of the comptroller-general.

Again, when the charters of the four early banks, the associates of the Bank of the State, in date as well as in the terms of their charter, were last extended, in 1852 and 1853, they were subjected to the same restrictions as the other banks mentioned. Their recharter was expressly made subject to the condition that their notes should be received in payment of taxes so long only as the banks should pay gold and silver current coin for their notes.

The Bank of the State was the property of the State. The State was its only stockholder, and its faith and credit stood publicly pledged for the payment of its notes. In the case of that bank all the specifications are absent. The legislature intentionally omitted to say that its bills should not be receivable for taxes when it failed to redeem them in specie.

It omitted to furnish the test of non-specie-payment, a protest, and omitted to authorize the comptroller-general to forbid their reception.

It is scarcely credible, under these circumstances, that the legislature intended the Bank of the State to stand upon the same plane with the other banks. We do not think it was so intended or that such is the legal effect of the statutes we have been considering.

The absence, in the case of the Bank of the State, of the necessary machinery to prevent the reception of its notes if it ceased to be a specie-paying bank, affords a strong argument in support of this view. The notes were intended to be received by the hundreds of tax collectors throughout the State, a class of men not usually qualified to decide nice legal questions, and not elected with a view to their capacity to make such decisions. Yet the question of whether a bank was a specie-paying bank or a non-specie-paying bank rested in the judgment and decision of the collector. If one collector held as a matter of law that a bank which paid specie on its bills but refused to pay specie on its deposits was a specie-paying bank, he could receive its notes in payment of taxes. If the collector in an adjoining district held that the payment of its deposits was a more important element than the redemption of its notes in specie, and that this afforded the test of a specie-paying bank, the notes could be refused by him. Great and inevitable confusion would result. That such confusion was anticipated, and that it was intended to be avoided, is evident from the clear, detailed, and precise provisions applied to those banks where the actual payment of specie by them was intended to be required. These details not being provided for the Bank of the State, a strong argument arises that the actual payment of specie was not intended to be required of that bank.

That the principle of implied repeal or modification does not apply to the charter of the Bank of the State we are considering is evident also from two other considerations: 1. The State of South Carolina had publicly undertaken and promised that the notes of this bank should be taken in pay-

ment of taxes and all other debts due to the State. It impressed the credit of the State upon the notes. Every man who held and received them had a right to rely upon this promise. When the State intended to terminate this obligation, as it has been held it could do upon reasonable notice and as to after-issued bills, it was bound to do it openly, intelligibly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be justifiable, so it is not to be imputed. 2. The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case.*

In September, 1868, an act was passed by the legislature of South Carolina to close the operations of this bank. In the fourth section it was enacted that the original act, "and all acts and parts of acts, which render the bills of said corporation receivable in payment of taxes and all other debts due to the State, be, and the same are hereby, repealed." The sixteenth section was the act, the extension of 1832 and the extension of 1852 were "the parts of acts" which rendered its bills receivable in payment of taxes. This was the explicit and intelligible declaration to which the public was entitled to, and the legislature intended to terminate the receivability of its notes in payment of taxes or debts due to the State. At this time, and not before, was the sixteenth section of its charter actually and legally repealed.

Much that is difficult in the consideration of the case of this bank is explained by the fact that the State itself was its sole stockholder, receiving all the benefits of its bills issued, and responsible for all its losses and the payment of its bills.

Upon the whole case we are clear that the judgment be-

* See Dillon on Municipal Corporations, § 54, where many cases to this effect are collected.

Statement of the case in the opinion.

low must be REVERSED, AND A MANDAMUS ISSUED to the collector, directing him to receive in payment of the relator's taxes the bills offered by him.

BRADLEY, J.: I dissent from the opinion of the court in this case. I agree that the legislature of South Carolina meant the same thing by the expression "notes of specie-paying banks" and the expression "notes of banks payable in specie," or an equivalent phrase. But, in my judgment, it was meant by both expressions to indicate "notes of banks actually paying specie."

The other questions in the case were not raised or considered and need not be adverted to.

Mr. Justice SWAYNE did not sit in this case.

LASERE v. ROCHEREAU.

Judicial proceedings during the war of the rebellion, within lines of the Federal army, by a private person on a mortgage, ending in a judgment and sale of the mortgaged premises, against one who had been expelled by the military authority of the United States into the so-called Confederacy, and who had no power or right to return to his home during the rebellion, held null, and a judgment which refused to vacate them reversed. *Dean* v. *Nelson* (10 Wallace, 172) affirmed.

ERROR to the Supreme Court of Louisiana, in which court several cases were consolidated. They came from it here as a single case.

Messrs. J. A. & D. G. Campbell, for the plaintiff in error. No opposing counsel.

Mr. Justice SWAYNE stated the facts of the case, and delivered the opinion of the court.

In May, 1863, the plaintiff in error was, and had been for

many years, a resident of the city of New Orleans. On the 9th of that month—being "a registered enemy" of the United States—a military order was issued that he should "leave that parish for the so-called Confederacy before the 15th instant." The order was obeyed. He proceeded to Mobile, and remained there until the capture of that place by the National forces in April, 1865. He thereupon returned immediately to New Orleans, and was not further molested there by the military authorities. The subjugation of the city of New Orleans by the forces of the United States became complete on the 6th of May, 1863. It remained thenceforward in their possession until the close of the insurrection. The absence of Lasere from New Orleans, like his departure, was enforced and involuntary. He intended to return, and, as soon as permitted to do so, did return and resume his residence. In the fall of 1863, after his expulsion, proceedings by executory process were instituted against him upon two mortgages for the seizure and sale of the mortgaged premises, consisting of a house and lot in New Orleans. The first order bears date on the 23d of November. On the 27th of that month the sheriff returned on the notice of demand of payment, that, "after diligent search and inquiry," he "was informed" that Lasere had "left the city and State without leaving an agent to represent him." A curator *ad hoc* was thereupon appointed, but it does not appear that he took any action. "After the legal delay had expired" the sheriff proceeded to advertise and sell the premises, and conveyed them to the purchaser. Lasere, after his return from Mobile, instituted the original cases to vacate those proceedings. They terminated in the adverse judgment which is before us for review.

It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard.* Scant time was allowed the plaintiff in error to prepare for his removal

* McVeigh v. United States, 11 Wallace, 267.

within the Confederate lines. During his absence he had no legal right to appoint an agent or to transact any other business in New Orleans.* This legal proposition has been so often and so fully discussed by this court that it is needless to go over the same ground again.

If the law were otherwise, it is to be presumed that any communication between Mobile and New Orleans was impracticable. Lasere doubtless knew nothing of the proceedings against him; and, if he had had such knowledge, he was powerless to do anything to protect his rights.

The point here involved was decided by this court in *Dean* v. *Nelson*.† It was there said: "The defendants in the proceedings"—meaning the original proceedings—"the appellees here, were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see or obey it. As to them, the proceedings were wholly void and inoperative."

The case thus condemned is substantially the one before us.

JUDGMENT REVERSED, and the case remanded to the court whence it came, with directions to proceed

IN CONFORMITY TO THIS OPINION.

EX PARTE ATOCHA.

1. Claims under treaty stipulations are excluded from the general jurisdiction of the Court of Claims conferred by the acts of Congress of February 24th, 1855, and March 3d, 1863; and when jurisdiction over such claims is conferred by special act, the authority of that court to hear and determine them, and of this court to review its action, is limited and controlled by the provisions of that act.

---

* Coppell *v.* Hall, 7 Wallace, 558. † 10 Wallace, 172.

Statement of the case.

2. An act of Congress passed on the 14th of February, 1865, "for the relief of Alexander J. Atocha," directed the Court of Claims to examine into his claim against the government of Mexico for losses sustained by him by reason of his expulsion from that country in 1845, and provided that if the court was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, it should "fix and determine" its amount, and declared that the loss or damage sustained by him, thus adjudicated and determined, should be paid out of any money in the treasury not otherwise appropriated, subject only to the condition that the amount did not exceed the unapplied balance of the sum provided by the treaty. Under this act the claim of Atocha was presented to that court for examination and determination. The court gave its decision to the effect that it was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, and "fixed and determined" the amount of the loss and damage sustained by Atocha, and declared that it would be satisfied by the United States paying to the administratrix of the estate of the claimant the balance remaining unapplied of the sum designated in the treaty: *Held*, that the decision of the Court of Claims was final under the special act, and that no appeal would lie from it to this court.

PETITION and motion for mandamus: the case being thus:

By the treaty of Guadalupe Hidalgo, made on the 2d of February, 1848, between the United States and Mexico, the United States exonerated Mexico from all demands of their citizens, which had previously arisen, and had not been decided against that government, and engaged to satisfy them to an amount not exceeding $3,250,000. They also stipulated for the establishment of a board of commissioners to ascertain the validity and amount of the claims, and provided that its awards should be final.*

In execution of this stipulation Congress, on the 3d of March, 1849, passed an act creating a board of commissioners to examine the claims, and provided for the payment of its awards, or a proportional part thereof, from the amount designated in the treaty. The act required the board to terminate its business within two years from the day of its organization.†

* 9 Statutes at Large, 938, Arts. XIV and XV of the Treaty.

† Ibid. 394.

Statement of the case.

To this board Alexander J. Atocha, a naturalized citizen of the United States, presented a claim against the government of Mexico for losses sustained by reason of his expulsion from that country in 1845. In the prosecution of his claim evidence was taken and laid before the board, but whether it was acted upon, and what proceedings were subsequently taken, did not appear by the record. For aught that appeared the claim might not have been prosecuted to a final determination; it might have fallen from the expiration of the board, or it might have been rejected on its merits. It was, however, immaterial, so far as the present inquiry was concerned, what had been its fate before the board. If rejected, the United States were the only party to insist upon the finality of the determination. Mexico was released from the claim, and it did not concern her what consideration the United States might choose to give to it, so long as other claimants against her were not in consequence denied payment of their demands, and there was no pretence that such was the case. On the contrary, a balance remained of the amount designated in the treaty after the satisfaction of the awards made. And on the 14th of February, 1865, Congress passed a special act for the relief of Atocha, and by it directed the Court of Claims to examine into his claim, and provided that if the court was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, it should "fix and determine" its amount, and declared that the loss or damage sustained by him, thus adjudicated and determined, should be paid out of any money in the treasury not otherwise appropriated, subject only to the condition that the amount did not exceed the unapplied balance of the sum designated in the treaty.*

The claim was accordingly brought, in pursuance of the act, before the Court of Claims for examination and determination. To aid in its examination Congress passed, on the 5th of April, 1870, an amendatory act authorizing Atocha,

* 18 Stat. at Large, 595.

in the prosecution of his claim, and the government in defending against it, to use such portions of the evidence taken in pursuance of the rules and regulations of the commission established under the treaty as consisted of the testimony of persons since deceased, and declared that the court should give to this evidence, so far as its subject-matter was competent, such weight as in the judgment of the court, under all the circumstances, it ought to have.*

On the 26th of May, 1873, the Court of Claims rendered its decision. Reciting that having examined into the claim, in pursuance of the act of Congress, it announced that it was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, and "fixed and determined" the amount of the loss and damage sustained by Atocha by reason of his expulsion from that country at the sum of $207,852.60, and declared that this sum would be satisfied and discharged by the payment by the United States to Eliza J. Atocha, who is the administratrix of the estate of the original claimant, of the balance remaining unapplied of the sum designated in the treaty, which was a few hundred dollars less than the amount awarded.

From this decision the Attorney-General applied for an appeal on behalf of the United States. The application was denied, the Court of Claims being of opinion that no appeal was by law allowed in the case. On motion of the Attorney-General an alternative writ of mandamus was directed to the judges of that court to allow the appeal. In their return the judges referred to the special act under which the Court of Claims heard the case, and placed their refusal on the ground, substantially, that the court acted not under any general grant of jurisdiction, but under the limited authority prescribed by that act; that it was the intention of Congress that the court should proceed not as a court trying an action against the United States, but as a commission similar to that provided by the treaty; that no claim against

* 16 Stat. at Large, 688.

the United States was submitted to its adjudication; that in the absence of any provision in the special act for an appeal none would lie unless some other provision of law authorized it, and that the provisions contained in the general acts of March 3d, 1863, and June 25th, 1868, in relation to appeals from judgments of the Court of Claims, did not apply, as the first act only gave an appeal from judgments on claims against the United States, and the second act from judgments adverse to the United States.

Upon this return, as upon a demurrer to its sufficiency, the Attorney-General asked for a peremptory mandamus.

Mr. G. H. Williams, Attorney-General, and Mr. J. Goforth, Assistant Attorney-General, in favor of the mandamus; Messrs. J. J. Weed, W. P. Clarke, R. M. Corwine, and Edward Janin, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The question for determination is, whether, under the acts of Congress investing the Court of Claims with general jurisdiction to hear and determine claims, an appeal lies from its decision in this case. If an appeal is authorized it must be by the provisions of the act of March 3d, 1863, amending the act establishing the Court of Claims, or of the act of June 25th, 1868, providing for appeals from its judgments.

The original act of February 24th, 1855, establishing the court, gave it jurisdiction to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which might be suggested to it by petition, and all claims which might be referred to the court by either house of Congress; but it did not authorize any appeal from the decisions of the court. It required the court to report to Congress the cases upon which it had finally acted, and the material facts established by the evidence in each, with its opinion and the reasons upon which the opinion was founded. It was not

until the passage of the act of March 3d, 1863, that an appeal from its decisions was allowed. That act materially amended the original act, added two more judges, gave the court jurisdiction over set-offs and counter-claims, and authorized an appeal to the Supreme Court in all cases where the amount in controvery exceeded $3000, and without reference to the amount, where the case involved a constitutional question, or the judgment or decree affected a class of cases, or furnished a precedent for the future action of an executive department. But the act at the same time declared that the jurisdiction of the court should not extend to or include any claim against the government, not pending in the court on the 1st of December, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or the Indian tribes. All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants; and in their decision the court was to be governed by those established rules of evidence which determine controversies between litigants in the ordinary tribunals of the country. Those acts have since then applied only to claims made directly against the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty.

The act of June 25th, 1868, whilst allowing appeals on behalf of the United States from all final judgments of the Court of Claims adverse to the United States, did not change the character of the claims of which that court could previously take cognizance. Claims under treaty stipulations are not brought within it, and when jurisdiction over such claims is conferred by special act, the authority of that court to hear and determine them, and of this court to review its action, is limited and controlled by the provisions of that act.

In the case of *Meade* v. *United States*, the special act of

Congress was passed to remove the restriction of the ninth section of the act of 1863, and his claim was referred to the Court of Claims "for adjudication thereof, pursuant to authority conferred upon said court by any existing law to examine and decide claims against the United States, referred to it by Congress."* His claim was thus placed under the jurisdiction of the court equally as though the ninth section were not in existence.

In the present case, no such general reference was made of the claim of Atocha, nor was any such extended authority over it conferred. The court was directed to make a specific examination into the justice of the claim against Mexico, and whether it was embraced within the treaty; and if the court was of opinion that the claim was a just one and was embraced within the treaty, it was required "to fix and determine" its amount, and when so determined, the act declares that the amount shall be paid. The matter was referred to the court to ascertain a particular fact to guide the government in the execution of its treaty stipulations. The court has acted upon the matter, and as no mode is provided for a review of its action, it must be taken and regarded as final.

Our judgment is, that the return of the judges of the Court of Claims to the alternative writ is sufficient, and a peremptory mandamus is

DENIED.

RAILROAD COMPANY v. BROWN.

1. An act of Congress, in cases of a suit against a railroad company which it incorporated, authorized service of process "on any director of the company." On a suit brought, the marshal made a return of service, July 6th, 1868, on J. S., "*reputed* to be one of the directors of the company." The record showed that on the 5th of May, 1866, J. S. was, in fact, one of the directors. *Held*, sufficient service, in the absence of proof, that J. S. was not one of the directors at the time of service; and

* 14 Stat. at Large, 611.

the defendant having appeared and moved, for want of sufficient service, the opening of a judgment which had been obtained for default; which motion as asked for, the court refused, but granted on condition that the defendant appeared; which he did, and proceeded to trial.

2. A railroad corporation run on the joint account of a receiver of part of it and the lessees of the remaining part, *held* liable for injuries committed, by a servant of the parties working it, upon the person of a passenger whom such servant improperly expelled from a car, into which the passenger had entered; the railroad corporation having allowed tickets to be issued in its own name, in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad corporation was not itself managing the road.

3. An act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted also that "no person shall be excluded from the cars on account of color." *Held*, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons.

ERROR to the Supreme Court for the District of Columbia; the case being thus:

In the year 1854, Congress authorized the Alexandria and Washington Railroad Company,* a company which had been incorporated by the State of Virginia, and whose road began at Alexandria, a town seven miles south of Washington, and ran northward to the south side of the Potomac, to extend their road *into* the District of Columbia, in a way designated.

The act of incorporation provided that in case of suit against the company "the service of process . . . may be made on . . . *any director of the company.*"

In 1863, the company got a further grant of power,† authorizing it to extend its road northward, so as to connect itself with the Baltimore and Ohio Railroad. This grant was, however, accompanied with a provision, "that no person shall be excluded from the cars on account of color."

In 1866, the Washington, Alexandria, and *Georgetown*

* 10 Stat. at Large, 810, § 8. † 12 Id. 805.

Statement of the case.

Railroad Company, which had succeeded to the chartered rights of the old Alexandria and Washington Company, obtained from Congress an amendment* to the last-mentioned act—the act of 1863—so as to change the route of extension, and for other purposes. This act speaks of "the Washington, Alexandria, and Georgetown Railroad Company," as "a corporation lawfully succeeding to the charter, rights, and privileges of the Alexandria and Washington Railroad Company." The road, under its new name, was at the time of this act leased to two persons named Stevens and Phelps. The new company not very long after fell into pecuniary difficulties, and the portion of it within the District of Columbia, by a decree of the Supreme Court of the District, was placed in the possession of a receiver, and the whole road was worked on the joint account of the lessees on the Virginia side and the receiver on the District side.

In this condition of things, one Catharine Brown, a colored woman, on the 8th of February, 1868, anterior to the adoption of the fourteenth and fifteenth amendments to the Constitution, bought a ticket to come from Alexandria to Washington. The ticket was issued in the name of "the Washington, Georgetown, and Alexandria Railroad Company;" as were, indeed, all the tickets at each end of the route. No tickets were distinguished as for white persons or colored persons, nor for any particular sort or class of cars. All were exactly alike.

When the woman went to take her place in the cars there were standing there two cars, alike comfortable; the one, however, set apart for colored persons, and the other "for white ladies, and gentlemen accompanying them;" the regulation having been that in going down from Washington to Alexandria, the first should be occupied by the former, and the last by the latter; and that in coming back the use should be simply reversed. When about to get into one of the cars, a servant of the persons managing the road stationed near the cars to direct passengers, told the woman

* 14 Stat. at Large, 248.

not to get into the car into which she was about to enter, but to get into the one before it; that he had been instructed by persons in charge of the road not to permit colored persons to ride in the car in which she was getting, but to have them go in the other. The woman, however, persisted in going into the car appropriated for white ladies, and the man put her out with force, and, as she alleged, some insult. She then got into the car into which she had been directed to get—the one assigned to colored people—was carried safely into Washington and got out there.

Hereupon she sued the *Washington, Alexandria, and Georgetown Railroad Company* in the Supreme Court of the District.

The marshal of the District made return that he had "served copy of summons and declaration on Joseph Stewart, *reputed to be* one of the directors of the company, the defendant." Judgment was entered by default, and the question of damages referred to a jury for inquisition. The company afterwards moved to set aside the judgment because no sufficient service had been made. The court refused to grant this motion as thus asked for; but granted it on the entry of an appearance in ten days by the company and the receiver; and ordered the case to be put on the calendar for trial. The case was tried. On the trial evidence was introduced by the defendant tending to show that the ejection had not been with insult or unnecessary force; that the regulation of separating white from colored persons was one which was in force on the principal railroads in the country; that unless the said regulation had been adopted on this road, travel upon it would have been seriously injured; and that the establishment of such a regulation itself increased the expenses of the road considerably, and that without such a regulation the receipts of the road would have decreased.

The counsel of the company requested the court to instruct the jury:

1st. That on the evidence there had not been due service of process on the defendant, and that the plaintiff could not recover.

2d. That if the injuries complained of were received when the road was in the possession of the lessees and receiver,—worked and conducted by them,—the verdict should be for the defendant.

3d. That if by a standing regulation certain cars were appropriated and designated for the use of white persons, and certain others for the use of colored, and all the cars were equally safe, clean, and comfortable, and if this sort of regulation was one in force on the principal railroads of the country, and one which unless it had been adopted on this road, the travel on it would have been seriously injured and the receipts of the road decreased, and if the establishment of such a regulation itself increased the expenses of the road considerably—then, in case no insult nor greater force than was necessary had been used, and the plaintiff after taking a seat in the car appropriated for colored persons, was carried safely into Washington and got out there—that the plaintiff could not recover.

The court refused to give any one of the instructions, and a verdict having been given in $1500 for the plaintiff, and judgment entered on it, the company brought the case here, assigning as three causes of error the refusals to give the charges requested.

Messrs. T. T. Crittenden and D. Clarke, for the plaintiff in error; Messrs. S. R. Bond and W. A. Cook, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There are but three points in this record which the assignments of error bring before us for review, and only the last relates to the merits of the controversy.

1. It is objected that the Circuit Court did not acquire jurisdiction of the defendant below for want of proper service of process. But this objection is not well taken, because the process was served on Stewart, a director of the road, and this service was in conformity to law.* It is true

* 10 Stat. at Large, 810, § 8.

the marshal does not return as a fact that Stewart was a director, only that he was reputed to be so, but the record shows he was a director when the road was leased, and in the absence of proof to the contrary, it will be presumed this relation existed when the summons in this case was served. Even if the service were defective, the plaintiff in error is not in a position at this time to except to it. The record discloses that, soon after the action was commenced, a judgment by default was entered for want of a plea, and that the plaintiff in error appeared by attorney and moved the court to set it aside on the ground that there had been no sufficient service of process. This motion was denied for the reason stated, but the court ordered the default to be opened and the cause placed on the trial calendar, on the condition that the appearance of the plaintiff in error was entered by the receiver within a period of ten days. This order was, doubtless, made in order to give the company an opportunity to defend, and at the same time to set at rest the point raised about the service in case the merits of the action were tried. The condition thus imposed was complied with, and for aught that appears, the subsequent litigation has been conducted on the part of the company by its voluntary appearance in every stage of the case.

2. The second assignment of error denies the liability of the corporation for anything done while the road is operated by the lessees and receiver.

It is the accepted doctrine in this country, that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees.* The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether

* 1 Redfield on the Law of Railways, 5th ed., chap. 22, § 1, p. 616.

this be so or not, we are not called upon to decide, because it has never been held that the company is relieved from liability, unless the possession of the receiver is exclusive and the servants of the road wholly employed and controlled by him. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver.

Apart from this view of the subject, the ticket on which the plaintiff rode, was issued in the name of the Washington, Georgetown, and Alexandria Railroad Company, as were all the tickets sold at both ends of the route. The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Catharine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this road was run as railroads generally are, by a chartered company. Besides, the company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts.

The third and last assignment of error asserts the right of the company to make the regulation separating the colored from the white passengers.

If the defendant in error had the right to retain the seat she had first taken, it is conceded the verdict of the jury should not be disturbed.

It appears that the Washington and Alexandria Railroad Company, in 1863, was desirous of extending its road from

the south side of the Potomac near to the Baltimore and Ohio depot, in Washington, and Congressional aid was asked to enable it to do so. The authority to make the extension was granted,* and the streets designated across which the road should pass. This grant was accompanied with several provisions, among the number was one that no person shall be excluded from the cars on account of color. In 1866, the plaintiff in error, which had succeeded to the chartered rights of the previous company, obtained from Congress an amendment to the former act, so as to change the route of the extension, and for other purposes.† The latter act leaves all the provisions of the former act in full force, and the present company, therefore, is obliged to observe in the running of its road all the requirements imposed by Congress in its previous legislation on the subject. This leads us to consider what Congress meant in directing that no person should be excluded from the cars of the company on account of color.

The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.

This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion in legislating for a railroad corporation to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of any one an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use of the cars

* 12 Stat. at Large, 805. † 14 Id. 248.

on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it. It was the privilege of the company to reject it, but to do this, it must reject the whole legislation with which it was connected. It cannot accept a part and repudiate the rest. Having, therefore, constructed its road as it was authorized to do, and in this way greatly added to the value of its property, it will be held to a faithful compliance with all the terms accompanying the grant by which it was enabled to secure this pecuniary advantage.

In our opinion there is no error in the record, and the judgment below must be

AFFIRMED.

ADAMS v. BURKE.

1. Where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to *use* it anywhere, without reference to other assignments of territorial rights by the same patentee.
2. The right to the *use* of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation of the right of use within a given locality.

APPEAL from the Circuit Court for the District of Massachusetts; the case being thus:

On the 26th day of May, 1863, letters-patent were granted

to Merrill & Horner, for a certain improvement in coffin-lids, giving to them the exclusive right of making, using, and vending to others to be used, the said improvement.

On the 13th day of March, 1865, Merrill & Horner, the patentees, by an assignment duly executed and recorded, assigned to Lockhart & Seelye, of Cambridge, in Middlesex County, Massachusetts, all the right, title, and interest which the said patentees had in the invention described in the said letters-patent, for, to, and in a circle whose radius is ten miles, having the city of Boston as a centre. They subsequently assigned the patent, or what right they retained in it, to one Adams.

Adams now filed a bill in the court below, against a certain Burke, an undertaker, who used in the town of Natick (a town about seventeen miles from Boston, and therefore outside of the circle above mentioned) coffins with lids of the kind patented, alleging him to be an infringer of their patent, and praying for an injunction, discovery, profits, and other relief suitable against an infringer.

The defendant pleaded in bar:

"That he carries on the business of an undertaker, having his place of business in Natick, in said district; that, in the exercise of his said business, he is employed to bury the dead; that when so employed it is his custom to procure hearses, coffins, and whatever else may be necessary or proper for burials, and to superintend the preparation of graves, and that his bills for his services in each case, and the coffin, hearse, and other articles procured by him, are paid by the personal representatives of the deceased; that, since the date of the alleged assignment to the plaintiff of an interest in the invention secured by the said letters-patent, he has sold no coffins, unless the use of coffins by him in his said business, as above described, shall be deemed a sale; has used no coffins, except in his said business as aforesaid; and has manufactured no coffins containing the said invention; and that since the said date he has used in his business as aforesaid, in Natick, no coffin containing the invention secured by said letters-patent, except such coffins containing said invention as have been manufactured by said Lockhart & Seelye, within a circle, whose radius is ten miles, having the

city of Boston as its centre, and sold within said circle by said Lockhart & Seelye, without condition or restriction."

The validity of this plea was the question in the case. The court below, referring to the case of *Bloomer* v. *McQuewan*,* in which Taney, C. J., delivering the opinion of the court, said:

"When a machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."

And referring also to some other cases, held that the plea was good. And from a decree which followed, dismissing, of course, the bill, this appeal was taken.

Mr. C. B. Goodrich, for the appellant; Messrs. R. H. Dana and L. S. Dabney, contra.

Mr. Justice MILLER delivered the opinion of the court.

The question presented by the plea in this case is a very interesting one in patent law, and the precise point in it has never been decided by this court, though cases involving some of the considerations which apply to it have been decided, and others of analogous character are frequently recurring. The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue.

We have repeatedly held that where a person had purchased a patented machine of the patentee or his assignee, this purchase carried with it the right to the use of that machine so long as it was capable of use, and that the expiration and renewal of the patent, whether in favor of the original patentee or of his assignee, did not affect this right. The true ground on which these decisions rest is that the sale by a person who has the full right to make, sell, and use such a machine carries with it the right to the use of that machine to the full extent to which it can be used in point of time.

* 14 Howard, 549.

The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.

But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly.* That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.

If this principle be sound as to a machine or instrument whose use may be continued for a number of years, and may extend beyond the existence of the patent, as limited at the time of the sale, and into the period of a renewal or extension, it must be much more applicable to an instrument or product of patented manufacture which perishes in the first use of it, or which, by that first use, becomes incapable of further use, and of no further value. Such is the case with the coffin-lids of appellant's patent.

It seems to us that, although the right of Lockhart & Seelye to manufacture, to sell, and to use these coffin-lids was limited to the circle of ten miles around Boston, that a purchaser from them of a single coffin acquired the right to use that coffin for the purpose for which all coffins are used. That so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent. It would be to engraft a limitation upon the right of use not contemplated by the statute nor within the reason of the contract to say that it could only be used within the ten-miles circle. Whatever, therefore, may be the rule when patentees subdivide territorially their patents, as to the exclusive right *to make* or *to sell* within a

* Bloomer *v.* McQuewan, 14 Howard, 549; Mitchell *v.* Hawley, 16 Wallace, 544.

limited territory, we hold that in the class of machines or implements we have described, when they are once lawfully made and sold, there is no restriction on their *use* to be implied for the benefit of the patentee or his assignees or licensees.

A careful examination of the plea satisfies us that the defendant, who, as an undertaker, purchased each of these coffins and used it in burying the body which he was employed to bury, acquired the right to this use of it freed from any claim of the patentee, though purchased within the ten-mile circle and used without it.

The decree of the Circuit Court dismissing the plaintiff's bill is, therefore,

AFFIRMED.

Mr. Justice BRADLEY (with whom concurred Justices SWAYNE and STRONG), dissenting:

The question raised in this case is whether an assignment of a patented invention for a limited district, such as a city, a county, or a State, confers upon the assignee the right to sell the patented article to be used outside of such limited district. The defendant justifies under such a claim. He uses a patented article outside of the territory within which the patent was assigned to the persons from whom he purchased it. The plaintiff, who claims under the original patentee, complains that this is a transgression of the limits of the assignment.

If it were a question of legislative policy, whether a patentee should be allowed to divide up his monopoly into territorial parcels, it might admit of grave doubt whether a vendee of the patented article purchasing it rightfully, ought to be restrained or limited as to the place of its use. But the patent act gives to the patentee a monopoly of use, as well as of manufacture, throughout the whole United States; and the eleventh section of the act (of 1836) expressly authorizes not only an assignment of the whole patent, or any undivided part thereof, but a "grant and conveyance of the exclusive right under any patent, to make and *use*, and to

grant to others to make and use the thing patented within and throughout any specified part or portion of the United States."*

If an assignment under this clause does not confer the same rights within the limited district which the patentee himself previously had in the whole United States, and no more, it is difficult to know what meaning to attach to language however plain.

On the 26th day of May, 1863, letters-patent were granted to Merrill & Horner, for a certain improvement in coffin-lids, giving to them the exclusive right of making, using, and vending to others to be used, the said improvement.

On the 13th day of March, 1865, Merrill & Horner, the patentees, by an assignment duly executed and recorded, did assign to Lockhart & Seelye, of Cambridge, in Middlesex County, Massachusetts, all the right, title, and interest which the said patentees had in the invention described in the said letters-patent, for, to, and in a circle whose radius is ten miles, having the city of Boston as a centre. By necessary consequence (as it seems to me), the right thus assigned consisted of the exclusive right to make, use, and vend the improved coffin-lid within the limited territory described; but did not include any right to make, use, or vend the same outside of those limits. As the assigned right to make the lids was a restricted right, limited to the territory; so the assigned right to use them was a restricted right limited in the same manner. Each right is conveyed by precisely the same language. A different construction would defeat the intent of the parties. For if the assignees, after making any number of lids within the limited district, could use them or authorize others to use them outside of the district, the balance of the monopoly remaining in the hands of the patentees might be rendered of little value.

If it be contended that the right of vending the lids to others enables them to confer upon their vendees the right

* Washburn v. Gould, 3 Story, 131; Blanchard v. Eldridge, 1 Wallace, Jr. 339.

to use the lids thus sold outside of the limited district, the question at once arises, how can they confer upon their vendees a right which they cannot exercise themselves? The only consistent construction to be given to such an assignment is, to limit all the privileges conferred by it to the district marked out. It is an assignment of the manufacture and use of the patented article within that district, and within that district only.

Difficulties may, undoubtedly, be suggested in special cases. If the patented thing be an article of wearing apparel, sold by the assignee within his district, it is confidently asked, cannot the purchaser wear the article outside of the district? The answer to acute suggestions of this sort would probably be found (in the absence of all bad faith in the parties) in the maxim *de minimis non curat lex.*

On the other hand, the difficulties and the injustice which would follow from a contrary construction to that which I contend for, are very obvious. Take the electric telegraph, for example. Suppose Professor Morse had assigned his patent within and for the New England States. Would such an assignment authorize the vendees of his assignees to use the apparatus in the whole United States? Take the planing machine: would an assignment from Woodworth of his patent within and for the State of Vermont, authorize the assignees to manufacture machines *ad libitum*, and sell them to parties to be used in other States? So of Hoe's printing press, and a thousand other machines and inventions of like sort.

Such a doctrine would most seriously affect not only the assignor (as to his residuary right in his patent), but the assignee also. For if it be correct, there would be nothing to prevent the patentee himself, after assigning his patent within a valuable city or other locality, from selling the patent machine or article to be used within the assigned district. By this means, the assignment could be, and in numberless instances would be, rendered worthless. Millions of dollars have been invested by manufacturers and mechanics in these limited assignments of patents in our manufacturing

districts and towns, giving them, as they have supposed, the monopoly of the patented machine or article within the district purchased. The decision of the court in this case will, in my view, utterly destroy the value of a great portion of this property.

I do not regard the authorities cited as establishing a different doctrine from that now contended for. The remark of Chief Justice Taney, in *Bloomer* v. *McQuewan*, that "when a machine passes to the hands of a purchaser, it is no longer within the limits of the monopoly; it passes outside of it, and is no longer under the protection of the act of Congress," is perfectly true in the sense and application in which the Chief Justice made it. He was speaking of time, not territory; of the right to use a machine after the original patent had expired and a renewal had been granted, not of using it in a place outside of the grant. All the effects mentioned by the Chief Justice would undoubtedly follow so far forth as it was in the power of the vendor to produce them, but no further. And he would never have contended that those effects would follow any further than the vendor's power to produce them extended. That is the very question in this case. How far did the assignee's interest and, therefore, his power extend? In my judgment it was limited in locality, both as to manufacture and use, and that he could not convey to another what he did not have himself. I hold, therefore, that the decree should be reversed.

PHILP ET AL. *v.* NOCK.

In a suit by a patentee, for damages against an infringer, the plaintiff can recover only for actual damages, and he must show the damages by evidence. They cannot be left to conjecture by the jury. Where he has sought his profit in the form of a royalty paid by his licensees and there are no peculiar circumstances, the amount to be recovered will be regulated by that standard. Counsel fees cannot be included in the verdict, and an instruction which directed the jury to award to the plaintiff "such sum as they should find to be required to remunerate him for the loss sustained by the wrongful act of the defendants, *and to reimburse him for all such expenditures as have been necessarily incurred by him in*

Argument for the plaintiff in error.

order to establish his right," was held to be erroneous as too broad and vague, and as tending to lead the jury to suppose that it was their duty to allow counsel fees and perhaps other charges and expenditures equally inadmissible.

ERROR to the Supreme Court of the District of Columbia.

Nock brought an action in the court below against Philp and others to recover damages for the infringement of a patent granted to him by the United States for an improvement touching the lids of inkstands and the hinge whereby such lids are attached. The case came on to be tried in March, 1870, and therefore while the Patent Act of July 4th, 1836,* which in suits against infringers gives to patentees "the actual damages sustained" by them, was in force; a similar provision, however, being made in the subsequent Patent Act of July 8th, 1870.† The bill of exceptions showed that the plaintiff gave in evidence that during the term of the patent "the defendants had sold inkstands having hinges that were infringements of the plaintiff's patent, to the number of seventy-five dozen, and that the royalty which the plaintiff received for the use of his patent was at the rate of $2 per gross." The testimony being closed, the court instructed the jury as follows:

"If the jury shall find a verdict for the plaintiff under the foregoing instructions, they will award him such sum as they shall find to be required to remunerate him for the loss sustained by the wrongful act of the defendants, and *to reimburse him for all such expenditures as have been necessarily incurred by him in order to establish his right.*"

To this instruction the defendant excepted.

A verdict and judgment having been given for the plaintiff in the sum of $500 the defendants brought the case here.

Mr. R. D. Mussey, for the plaintiff in error:

All the injury proved was that the defendants withheld royalty to the amount of $12.50. There was no evidence of any "expenditure" by Nock, and the instruction had no

* 5 Stat. at Large, 123. † 16 Id. 207.

foundation in the evidence. Its inevitable effect upon the minds of the jury was to lead them to believe they might lump counsel fees, and such other expenditures as they *inferred*, and out of them make a total. The jury followed this evident lead of the court, and returned a verdict for forty times the amount proven.

Mr. G. W. Paschall, contra:

The bill of exceptions does not show all the evidence in the case, but it may be gathered that the plaintiff below proved that the defendants had infringed his right by selling seventy-five dozen inkstands. What further facts he proved is not stated.

Mr. Justice SWAYNE delivered the opinion of the court.

The measure of the damages to be recovered against infringers prescribed by the act of 1836 as well as by the act of 1870, is "the actual damages sustained by the plaintiff." Where the plaintiff has sought his profit in the form of a royalty paid by his licensees, and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard. If that test cannot be applied, he will be entitled to an amount which will compensate him for the injury to which he has been subjected by the piracy. In arriving at their conclusion, the profit made by the defendant and that lost by the plaintiff are among the elements which the jury may consider. Where the infringement is confined to a part of the thing sold, the recovery must be limited accordingly. It cannot be as if the entire thing were covered by the patent; or, where that is the case, as if the infringement were as large as the monopoly. Counsel fees cannot be included in the verdict. The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at.

The instruction under consideration was too broad and too vague. The jury could have hardly doubted that it was their duty to allow the counsel fees paid or to be paid by

the plaintiff, and perhaps other charges and expenditures equally inadmissible.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to issue

A VENIRE DE NOVO.

CARLTON v. BOKEE.

1. Where a claim in a patent uses general terms of reference to the specification, such as "substantially in the manner and for the purpose herein set forth," although the patentee will not be held to the precise combination of all the parts described, yet his claim will be limited, by reference to the history of the art, to what was really first invented by him.
2. General claims inserted in a reissued patent will be carefully scrutinized, and will not be permitted to extend the rights of the patentee beyond what is shown by the history of the art to have been really his invention. If made to embrace more the claim will be void.
3. One void claim, if made by inadvertence and in good faith, will not vitiate the entire patent.

APPEAL from the Circuit Court for the District of Maryland.

William Carlton et al., as assignees of Christian Reichmann, filed their bill in equity in the court below to restrain Howard Bokee from infringing a patent for an improvement in lamps, granted to Reichmann on the 21st of September, 1858, and reissued to Carlton and one Merrill on the 11th of August, 1868.

The court below dismissed the bill, and the complainant took this appeal.

The case can be gathered from the facts stated in the opinion of the court.

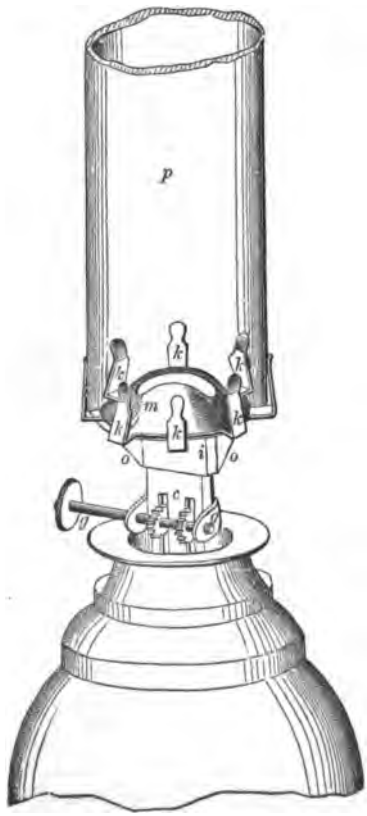
Messrs. J. H. B. Latrobe and B. R. Curtis, for the appellant; Messrs. C. F. Blake and C. M. Keller, contra.

Mr. Justice BRADLEY stated the facts and delivered the opinion of the court.

The lamp, as patented to Reichmann, was one of a large

number of attempts made about the time to utilize petroleum and its various products for purposes of illumination. The old lamps adapted to sperm oil, lard, and other gross and sluggish oils were unfitted for the use of so volatile and dangerous a substance. In them the flame was set close to the lamp, and the tube holding the wick was projected downward into the oil, so that the heat of the flame might be communicated thereto in order to render it more fluid and susceptible to the capillary attraction of the wick. Such an arrangement as this with petroleum would have produced a speedy explosion. This article required that the flame should be elevated as far as possible above the lamp and that the metallic wick-tube should not communicate any heat to the fluid. This was one object to be attained in the burners required for the use of the new illuminator. Another was some contrivance for concentrating a current of air upon the flame itself, so as to consume as perfectly as possible all the rapidly escaping volatile gases, both as a saving of light and as a preventive of the disagreeable odors which they would otherwise diffuse.

FIG. 1.



Reichmann's burner, illustrated in Figure 1, was intended to accomplish these main objects as well as some subsidiary ones, which will hereafter appear. It consisted of several distinct parts, combined and arranged in a particular manner. First, a flat

wick-tube (indicated in the figure by the letter *c*) attached to the cap or stopper of the lamp, and rising above the same one or two inches, more or less, according to the size of the burner, but not projecting into the lamp below. Secondly, ratchet-wheels attached to the side of the wick-tube on a small shaft (*g*), for raising and lowering the wick. Thirdly, a slide or sleeve (*i*) fitted to slip up and down over the wick-tube, and sufficiently tight to stay in any position thereon, and furnished with arms (*o*, *o*), two or more, for supporting above the wick-tube a dome or deflector (*m*). Fourthly, the dome aforesaid, having an oval or oblong slot for the flame to pass through, so that part of the flame might be above the dome and part below it. The object of this dome was to collect and concentrate the air upon the flame, in order to make it burn more brightly and consume the hydro-carbon and other gases which emanated from the petroleum. It also acted as a deflector of the light proceeding from the lower part of the flame, whereby it was thrown downward towards and around the lamp, whereas the light from that part of the flame above the dome was all thrown upward or horizontally about the room. Fifthly, around the periphery of the dome several narrow slips of the metal (*k*) were turned up, to act as arms or supports to the glass chimney of the lamp, and between these arms spaces were cut out of the edge of the dome, to allow air to pass up between the dome and chimney for the purpose of guiding the flame and feeding it with additional oxygen. Sixthly, the chimney itself (*p*), which was placed inside of and upon the said arms or supports, and held in its position thereby.

This was the combination of elements of which Reichmann's burner consisted, and it will be perceived that the chimney was so elevated that the flame of the lamp below the dome was exposed on every side, and a current of air or a rapid movement of the lamp would extinguish it. This was the great defect of the burner, which prevented its introduction into general use, and rendered it of little value. The principal advantage which Reichmann in his patent claimed for it was that it allowed the light from the under side of

the deflector to be reflected or thrown downward upon the table or lamp. This was effected by the use of upright, slender arms to support the dome, so that the space around and underneath the dome was left open and uninclosed. He also claimed some less important advantages in his arrangement of the ratchet-wheels for raising the wick, and one or two other things of no importance in this controversy.

The patent had but one claim and that amounted to the general combination of elements referred to and their peculiar arrangement. It was in these words:

"What I claim as new and desire to secure by letters-patent is, in combination with the lamp, the slotted, open, bell-shaped cap (*i. e.*, the dome), when so constructed, arranged, and operating as to allow light to be deflected downwards, substantially in the manner and for the purpose herein set forth and explained."

In order to understand how narrow this claim really was, it is necessary to know a little of the history of the art. Two well-known burners are conceded to have been in use before Reichmann's invention, which have a material bearing on his claims; the Vienna burner and Stuber's burner. These have been exhibited to us.

The Vienna burner, shown in Figure 2, contained the flat wick-tube, the ratchet-wheel attached thereto (but covered and not exposed as in Reichmann's), and a slotted dome above the wick for the flame to pass through, and a chimney; but the dome was not supported by slender arms, as in Reichmann's, but was connected with a gallery, which supported the chimney and surrounded the wick-tube and dome, and rested on the lamp or cap below, so that all the light of the flame below the dome was inclosed and lost and could not issue out as in Reichmann's burner. The drawing shows the dome (*a*), the surrounding gallery (*b*), and the lower part of the wick-tube (*c*).

The Stuber burner, invented by John Stuber in 1856, and made in considerable quantities in that and the following years at Utica, New York (shown in Figure 3), was an im-

Statement of the case and opinion of the court.

FIG. 2.

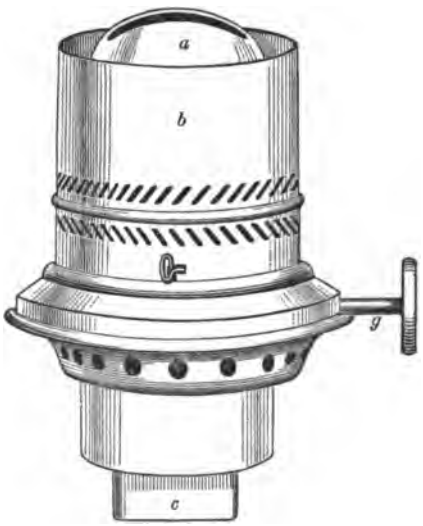


FIG. 3.

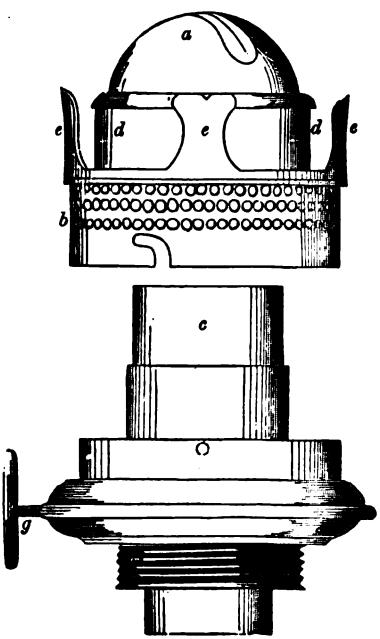
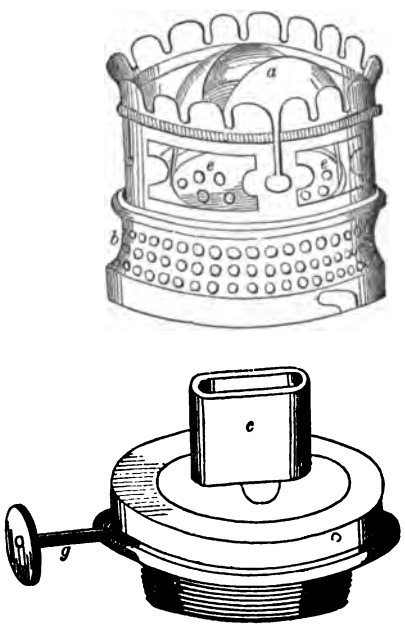


FIG. 4.



provement on the Vienna burner, in this, that the gallery was so low as to leave a considerable open space under the dome for the reflected light to pass out in a downward direction, and the dome was supported by slender arms (*d*), but these arms were attached to the gallery and not to a sleeve fitted on to the wick-tube. It differed, therefore, from Reichmann's in these respects: the chimney was supported on a low gallery instead of the dome itself, and the dome was supported by arms (*d*) attached to this gallery instead of arms attached to a sleeve on the wick-tube.* Therefore, with these burners before us, all the invention we can discover in Reichmann's burner is the peculiar mode of supporting his dome by slender arms attached to a sleeve fitted on to the wick-tube, and the elevation of the chimney on the outer edge of the dome. The latter peculiarity, as we have seen, is a defect which rendered the burner nearly useless.

The lamp made and sold by the defendants is substantially exhibited (in a sectional view) in Figure 5, which was patented to L. J. Atwood, October 13th, 1863. The dome and chimney are lifted from their place on the cap of the lamp to show the parts.

The allegation of the complainants that the defendant uses Reichmann's invention of peripheral springs (*m*) around the edge of the dome (*h*) for steadying his chimney we regard as fallacious. The transformation by a mere trick of words and vague generalities of the arms or supports used by Reichmann to sustain his chimney into peripheral springs may be ingenious, but it cannot stand the test of sober consideration. It is not pretended that Reichmann produced anything more than the arms or supports shown in his original patent, marked *k* in Figure 1. These were mere slips of

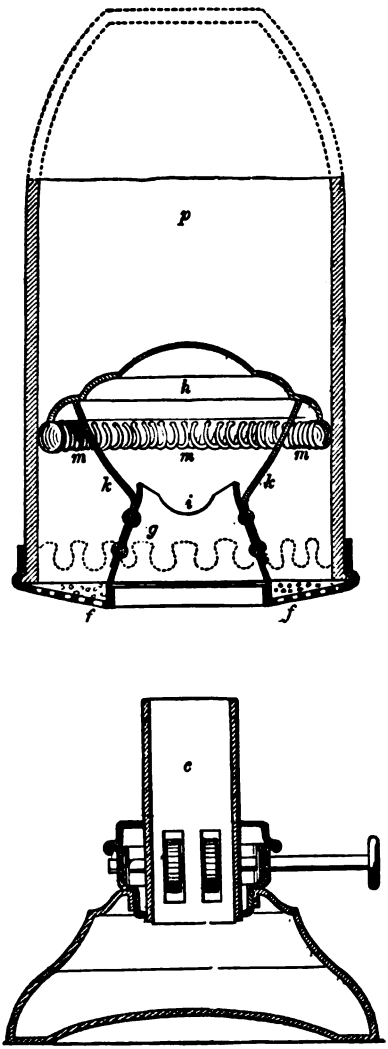
* The Figure 4 shows another form of Stuber's invention. In Figure 8 upright strips of metal embrace the exterior of the chimney so as to make it stand steadily. In Figure 4 an ornamented crown-piece with large openings, reducing the quantity of metal embracing the chimney to not greatly more than what is in the "upright strips of metal," seen in Figure 8, performs the same functions that the last do in the burner illustrated by the said Figure 8. —REP.

metal turned up around the edge of the dome, such as had been in common use for a great period of time. All that Reichmann did new in this regard was to elevate his chimney on the top of the dome. This, in fact, rendered his lamp in the main useless, and the defendant does not copy it, but slips his chimney down around the dome and places it on a platform perforated with holes, which rests upon the cap of the lamp and answers to the bottom or floor of Stuber's gallery. He thus surrounds the flame with the chimney below as well as above the dome and prevents it from being extinguished by drafts of air without obstructing the issue of the light from below the dome. In this respect his lamp is more like Stuber's than Reichmann's. It is true that he keeps his chimney from coming in contact with the dome by surrounding the latter with a fine spiral spring or metallic fringe (*m*), but this has no resemblance or analogy to the supporting arms appended by Reichmann to his dome.

The question whether the defendant's burner, which is called the Comet, contains the other peculiarity of Reichmann's burner, namely, the supporting of the dome by slender arms attached directly to a sleeve fitted snugly upon the wick-tube, admits of more discussion. The dome was supported by slender arms both in Stuber's and Reichmann's lamps, but in the former the arms were attached to the surrounding gallery on which the chimney rested, and which was slipped over a raised portion of the base (*f*) to which the wick-tube was affixed and there held in place by a bayonet fastening, whilst in Reichmann's burner the arms were attached to a sleeve, fitted directly upon the wick-tube so snugly as to support the dome and chimney firmly and steadily, as before described. Now, in the Comet burner of the defendant, the arms supporting the dome (*k*), Figure 5, are attached to the platform before mentioned, which answers the place of the gallery floor in Stuber's burner, and the central portion of which is perforated with an opening or slot (*i*) so as to pass down over the wick-tube when being placed on the lamp; around this slot or opening the platform is raised next to the wick-tube in a conical form (*g*), so

that the top edge of the raised part touches the wick-tube, and thus helps to give steadiness to the dome and chimney. The arms are attached to this raised part. But this raised portion of the platform is very far from being Reichmann's sleeve, which was a peculiar characteristic in his lamp, and the sleeve arrangement was all that Reichmann pretended to have produced. Its generalization in the reissued patent is simply effected by a dexterous use of words and vague generalities. We are constrained to hold, therefore, that the Comet burner is not an infringement of Reichmann's original patent or of the invention which is exhibited in his original specification.

FIG. 5.



It is proper next to inquire as to the bearing of the reissued patent on the question in litigation between the parties. The defences made by the defendant against this reissue are, first, that it was obtained illegally, wrongfully, and by false pretences, and because it seeks to claim things of which Reichmann was not the original and first inventor; secondly, that the original patent itself was void, be-

cause the only thing in it which Reichmann had any pretence of inventing was anticipated by a man by the name of Michael Collins, as early as 1843.

The specification of the reissued patent describes the burner of Reichmann substantially as was done in the original patent, being interspersed, however, with observations as to the uses and objects of particular parts, evidently borrowed from subsequent experience and events. The single claim of the original patent is expanded into seven distinct claims. The first three of these claims, taken with the qualifications which they contain, and limited as they must be by the state of the art at the time when the original patent was applied for, amount to precisely the same thing and to no more than the one claim of the original patent. The first is for a combination of only two elements, it is true, the flat wick-tube and the dome, which combination is found in both the Vienna and Stuber burners; but a qualification is added, that the combination is to be "under the *arrangement* substantially as shown and described, so that, *while directly connected with each other*, the said parts shall allow light to pass out or be reflected from between them, as set forth." Thus it is made essential to the invention here claimed, not only that the two elements named should be present, but that they should have the arrangement described in the patent, and should have a direct connection with each other, and that the light should be reflected from between them. All these things exist in the Stuber burner except one. In that burner the wick-tube and the dome are not directly connected together. The dome is first connected with the gallery and the gallery with the wick-tube. So that the claim is reduced to the same thing which was claimed in the original patent. The same may be said of the second and third claims. If they mean anything more than the claim in the original patent they are void. Being identical with that they are needlessly multiplied, and by exhibiting a seeming of claims to which Reichmann was not entitled they are calculated to confuse and mislead. We think it proper to reiterate our disapprobation of these ingenious attempts to

expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry and to cover antecedent inventions. Without deciding that a repetition of substantially the same claim in different words will vitiate a patent, we hold that where a specification by ambiguity and a needless multiplication of nebulous claims is calculated to deceive and mislead the public, the patent is void.

The fourth claim was clearly anticipated by the burner of Stuber. It is in the following words:

"A lamp-burner composed of two groups of elements, the first consisting of the base with its wick-tube and wick-adjusting rack and pinions; the second of a chimney-holder, deflector, and such other parts as may be needed for the proper combustion of the fluid so as to produce an illuminating flame, the two groups being united by friction, and the latter when in position in the burner being supported by the former without the intervention of any mechanical device whereby the two may be rigidly connected together, substantially as and for the purposes herein shown and set forth."

Everything here claimed is found in Stuber's burner. If this claim is valid Stuber could be enjoined. The addition of a bayonet fastening by Stuber does not destroy the identity of his lamp with the alleged invention described in this claim. It follows that this claim is void for this reason, without reference to other objections which have been suggested in relation to it. One void claim, however, does not vitiate the entire patent, if made by mistake or inadvertence and without any wilful default or intent to defraud or mislead the public. Giving to the complainants the whole benefit of this indulgence there is still nothing in the remaining claims which the defendant is called upon to answer. They are merely for combinations of parts in the original burner of Reichmann which the defendant does not use unless the pretence of a claim to peripheral springs as distinguished from Reichmann's arms and supports can be sustained. We have already seen that this cannot be done.

Our conclusion, therefore, is that the Comet burner is no infringement of Reichmann's reissued patent so far as that patent is valid.

This view of the case makes it unnecessary to discuss the question relating to the alleged invention of Collins. Whilst his conduct and testimony and that of the other witnesses who testify to his invention are susceptible of much criticism, we think it proper to say that we should feel great difficulty in disregarding it altogether. If the models presented by him were really his invention at the time sworn to, the Reichmann patent has no foundation whatever to stand on. But waiving the discussion of this question we feel bound to affirm the decree of the Circuit Court for the reasons above stated.

DECREE AFFIRMED.*

WILSON v. CITY BANK.

1. Under a sound construction of the thirty-fifth and thirty-ninth sections of the Bankrupt Act something more than passive non-resistance in an insolvent debtor, is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence.
2. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law.
3. Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act.
4. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment.
5. Very slight circumstances, however, which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, or to

---

* This case was adjudged at the term before last, but owing to the Reporter's inability to procure drawings of the different burners spoken of in the opinion, and which, as to most of them, were exhibited to the court only by the production of the burners themselves, an earlier report has not been practicable.

Statement of the case.

defeat the operation of the act, may, by giving color to the whole transaction, render the lien void.

6. These special circumstances must be left to decide each case as it arises. The present one held to be destitute of any such evidence, and distinguished from *Buchanan* v. *Smith* (16 Wallace, 277).

ON certificate of division in opinion between the judges of the Circuit Court for the District of Minnesota; the case being thus:

The Bankrupt Act of 1867* provides in the earlier part of it, that if any persons residing within the jurisdiction of the United States, shall apply by petition to the judge of the judicial district in which he has resided, &c., setting forth "his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors," and his desire to obtain the benefits of the act, he may, after certain proceedings mentioned, and with certain excepted cases, obtain "a discharge from all his debts." A subsequent part of the same act provides for proceeding by creditors to obtain a decree of bankruptcy against their debtor, who has not made any such voluntary application.

After the enactment relating to the first case contemplated—that is to say, of the debtor, himself, voluntarily applying to be decreed a bankrupt, the act in its thirty-fifth section thus proceeds:

"SECTION 35. That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, *with a view to give a preference to any creditor* or person having a claim against him, or who is under any liability for him, *procures* any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and *that such attachment, payment, pledge, as-*

* 14 Stat. at Large, 534.

signment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it, or so to be benefited.

"And if any person being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof as assets of the bankrupt.

"And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *primâ facie* evidence of fraud."

The thirty-ninth section, which relates to "involuntary bankruptcy," enacts thus:

"SECTION 39. That any person residing and owing debts as aforesaid who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or being absent shall, with such intent, remain absent; OR shall conceal himself to avoid the service of legal process, in any action for the recovery of a debt or demand provable under this act, OR shall conceal or remove any of his property to avoid its being attached, taken or sequestered on legal process, OR shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors, OR who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory, within which such debtor resides or has property, founded upon a demand in its nature provable against a bank-

rupt's estate under this act, and for a sum exceeding $100, and such process is remaining in force and not discharged by payment or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; OR has been actually imprisoned for more than seven days in a civil action founded on contract for the sum of $100 or upwards; OR who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or give any warrant to confess judgment; or *procure or suffer* his property to be taken on legal process, *with intent to give a preference to one or more of his creditors*, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; OR who, being a banker, merchant or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least $250, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

"And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent. And such creditor shall not be allowed to prove his debt in bankruptcy."

These enactments being in force, one Wilson, assignee in bankruptcy of the firm of Vanderhoof Brothers, lately merchants at the city of St. Paul, filed a bill against the City Bank of the said city to determine which of the parties, complainant or defendant, was entitled to the stock of goods of the bankrupts, or the proceeds thereof. The facts of the case, about which there was no dispute, were thus found by the court:

Statement of the case.

"On the 26th of February, 1870, judgment by default was rendered by one of the District Courts of the State of Minnesota in favor of the bank against Vanderhoof Brothers for the sum of $2130. On the same day execution was issued, and the sheriff immediately made a levy upon the whole stock of goods of the debtors, which was sold by him for $2385, which is now in the hands of the bankrupt court to await the determination of this suit. The suit by the bank was brought on promissory notes, commercial paper made by the debtors Vanderhoof Brothers to the City Bank of St. Paul, one of which notes was more than fourteen days past due when suit was brought thereon by the bank.

"After the levy of the said execution and before the sale by the sheriff, Vanderhoof Brothers were adjudicated bankrupts on the petition of creditors filed against them after judgment had been obtained and levy made under the execution. The Vanderhoofs had no defence to the notes upon which the bank had sued them, and put in no defence. They had no property except their said stock in trade, which, at cost prices, was about equal to the amount of their liabilities.

"The debtors Vanderhoof Brothers were insolvent when said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy, and that they had no property but their said stock in trade. The Vanderhoofs gave no notice to any of their creditors of the suit commenced against them by the bank, and having no defence, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution."

On this case the following questions arose at the trial, in relation to which the judges were opposed in opinion:

"1st. Whether or not an intent on the part of said debtors, Vanderhoof Brothers, to suffer their property to be taken on legal process, to wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the Bankrupt Act, can be inferred from the foregoing facts?

"2d. Whether, under said facts, the said bank in obtaining

said judgment and making the said levy had reasonable cause to believe that a fraud on the Bankrupt Act was intended?

"3d. Whether, under said facts, the bank obtained by the levy of its execution a valid lien on the said goods as against the assignee in bankruptcy?"

The questions were accordingly certified here for decision.

Mr. E. G. Rogers, for the assignee in bankruptcy:

I. Being insolvent, the Vanderhoofs suffered their entire stock of goods to be seized on execution on the judgment by default, obtained against them by the bank, with intent to give a preference to the bank over their other creditors, and in fraud of the thirty-fifth and thirty-ninth sections of the Bankrupt Act.

(1.) They suffered their property to be seized on execution.*

(2.) This was a transfer of the property, within the meaning of the thirty-fifth and thirty-ninth sections of the act.†

The bank stands in no better position than if the Vanderhoofs had paid the debt in money or in goods.‡

(3.) It was a transfer out of the usual and ordinary course of Vanderhoof Brothers' business, and, therefore, *primâ facie* fraudulent.

(4.) The necessary consequence of Vanderhoof Brothers suffering their entire stock in trade, and their entire property to be levied on, was to break up their business and put it out of their power to pay their other creditors. It appropriated their whole property to the payment of a single creditor, putting the property into the hands of that creditor,

* In re Dibblee, 2 Bankrupt Register, 185–187.

† In re Black & Secor, 1 Bankruptcy Register, 81; Wilson v. Brinkman, 2 Id. 149; In re Wright, Ib. 155; Fitch et al. v. McGie, Ib. 164.

‡ Shawhan v. Wherritt, 7 Howard, 644; Smith v. Buchanan, 4 Bankrupt Register, 134. [The second cited case which came up on appeal to this court, and in which the decree of the court below was *affirmed* (see *Buchanan* v. *Smith*, 16 Wallace, 277), was not cited in its appellate form, by the learned counsel, the volume in which the report is contained not having been at the time published.—REP.] Wilson v. City Bank, 5 Id. 274, opinion of Dillon, J.

enabling him to pay himself in full, without regard to whether other creditors were paid or not, and thereby necessarily gave a preference to that creditor.

It was an act of bankruptcy, and under the circumstances it was almost inevitable that the other and unpreferred creditors should proceed against Vanderhoof Brothers in bankruptcy (as has actually been the case), in which event the effect of suffering the levy is to impede, hinder, and delay the operation of the Bankrupt Act.

Vanderhoof Brothers must be presumed to have intended these natural and legal consequences of their conduct; they might have prevented them by filing their petition in voluntary bankruptcy. Not having done so, but having suffered a creditor to obtain a preference which they might have prevented, they must be presumed to have intended to give such preference.*

II. The bank having knowledge of the Vanderhoofs' acts of bankruptcy, and having also at least reasonable cause to believe the firm insolvent, had also reasonable cause to believe that a fraud upon the Bankrupt Act was intended by them, and in fact did themselves intend to obtain a preference in fraud of the act.

1. It follows as a necessary conclusion that if the bank had reasonable cause to believe the Vanderhoofs insolvent, "they had reason to believe that the Vanderhoof Brothers in neglecting to make payment of their debts, in submitting to suit and in neglecting to take the steps contemplated by the Bankrupt Act for the purpose, and equal benefit of all their creditors according to the plain intent and purport of the law, were acting in fraud of the law itself."†

* Denny v. Dana, 2 Cushing, 160; Beals v. Clark, 13 Gray, 18; In re Drummond, 1 Bankrupt Register, 10; In re Black & Secor, Ib. 81; In re Craft, Ib. 89; In re Sutherland, Ib. 140; Foster v. Hackley, 2 Id. 131; In re Dibblee, Ib. 185; In re Wells, 3 Id. 95; In re Smith, Ib. 98; In re Clark & Bininger, Ib. 99; S. C., on appeal, 4 Id. 77; Campbell v. The Traders' Bank et al., 3 Id. 124; Driggs v. Moore, Ib. 149; In re Bloss, 4 Id. 37; Martin v. Toof, 4 Id. 158.

† Wilson v. City Bank, 5 Bankrupt Register, 274, opinion of Dillon, J.; Smith v. Buchanan et al., 4 Id. 134.

They had reason to believe that if they seized all the Vanderhoof goods on execution, the bank would obtain a preference over their other creditors, and thereby a fraud on the act would be perpetrated. They as well as the Vanderhoofs must be presumed to have intended the consequences of their conduct, and these consequences were to give the bank a preference, and to prevent the property from being distributed equally among all Vanderhoof Brothers' creditors under the provisions of the Bankrupt Act.

2. The transfer effected by the levy being out of the usual and ordinary course of Vanderhoof Brothers' business, was *prima facie* evidence to the bank of fraud.

III. The bank, after acts of bankruptcy of the Vanderhoofs, of which it had full knowledge, and with reasonable cause to believe the Vanderhoofs insolvent, could not by proceeding in a State court obtain a valid lien and seize the property of the bankrupts to the exclusion of their other creditors. This is said by the Supreme Court of the United States, in *Shawhan* v. *Wherritt*,* to be "the chief and important question involved" in that case, and it was there held that such a proceeding on the part of the creditor was a fraud upon the Bankrupt Act, and therefore void.

Mr. Harvey Officer, *contra*, citing *Wright* v. *Filley*,† as in point, and other cases.

Mr. Justice MILLER delivered the opinion of the court.

The questions presented to this court by the certificate of division require, for a satisfactory answer, a careful consideration and construction of sections thirty-five and thirty-nine of the Bankrupt law, with reference to the general spirit and purpose of that law. In looking to these the first and most important consideration which demands our attention is the discrimination made by the act between the cases of voluntary and involuntary bankruptcy. In both classes of cases undoubtedly the primary object is to secure a just distribution of the bankrupt's property among his creditors,

* 7 Howard, 627, 644, 645.

† 4 Bankrupt Register, 197.

and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors.

But in case of voluntary bankruptcy the aid of the law is invoked by the bankrupt himself, with the purpose of being discharged from his debts as his principal motive, and in the other the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight and often contested.

There is a corresponding difference in the facts on which the action of this court can be invoked in these different classes of bankruptcy. When the party himself seeks the aid of the court the averment he is required to make is a very simple one, namely, that "he is unable to pay all his debts in full, and is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act," that is, to be discharged from the claims of his creditors. On filing a petition containing this request he is declared by the court a bankrupt. The allegation cannot be traversed, nor is any issue or inquiry as to its truth permitted. The administration of his effects proceeds thereafter under the direction of the court, and may end in paying all his debts with a surplus to be returned to the bankrupt, or the result may be nothing for the creditors, and the unconditional release of the bankrupt.

But while the debtor may on this broad basis call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which are essential to his right to appeal to the court. And when any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury.

The reason for this wide difference in the proceedings in the two cases is obvious enough. When a man is himself willing to refer his embarrassed condition to the proper court with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objec-

tion to the course he pursues. But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, in short to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be well defined in the law, but clearly established in the court.

It is the thirty-ninth section of the Bankrupt Act which lays down in nine or ten subdivisions the facts and circumstances which give a man's creditors the right to have him declared a bankrupt, and his property administered in a bankruptcy court. One of them is the case of a person who being bankrupt or insolvent, or in contemplation of insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, or to any person or persons who may be liable for him as indorsers, bail sureties, or otherwise, or with intent by such disposition of his property to defeat or delay the operation of the act. And the same section declares that if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred, contrary to the act; provided, the person receiving such payment or conveyance, had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent.

The case before us is one of involuntary bankruptcy, but there is no question here whether the party was rightfully declared a bankrupt. The statement of facts shows that the debtors were insolvent when the bank commenced its proceedings in the State court, and that the bank had then reasonable cause to believe they were insolvent, and knew that they had committed an act of bankruptcy, to wit, had permitted one of their notes to go unpaid more than fourteen days after it was due.

It is maintained that under these circumstances the bankrupt "suffered his property to be taken on legal process with intent to give a preference to the bank, and to defeat or delay the operation of the act." Undoubtedly, the facts stated bring the bank within the proviso, as to knowledge of the debtor's insolvency; and if the debtor suffered his property to be taken within the meaning of the statute, with intent to defeat or delay the operation of the act, then the assignee should recover the property. So that this sufferance and this intent on the part of the bankrupt are the matters to be decided. The first and principal question on which the judges became divided is, whether such intent is to be inferred from the facts stated.

The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in contemplation of insolvency or bankruptcy, declares that any attachment or seizure under execution of such person's property, *procured by him* with *a view* to give such a preference, shall be void if the act be done within four months preceding the filing of the petition in bankruptcy by or against him. Though the main purpose of the thirty-ninth section is to define acts of the trader which make him a bankrupt, and that of the thirty-fifth is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preferences void, and enabling the assignee of the bankrupt to recover the property; and both of them make this to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt's insolvent condition by the other party to the transaction. Both of them describe, substantially, the same acts of payment, transfer, or seizure of property so declared void. It is, therefore, very strongly to be inferred that the act of *suffering* the debtor's property to be taken on legal process in section thirty-nine, is precisely the same as procuring it to be attached or seized on execution in section thirty-five. Indeed, the words *procure* and *suffer* are both used in section thirty-nine.

What, then, is the true meaning of that phrase in the act?

In both cases it must be accompanied with an intent. In section thirty-five it is to give a preference to a creditor; in section thirty-nine it must be to give a preference to a creditor, or to defeat or delay the operation of the Bankrupt Act. In both there must be the positive purpose of doing an act forbidden by that statute, and the thing described must be done in the promotion of this unlawful purpose.

The facts of the case before us do not show any positive or affirmative act of the debtors from which such intent may be inferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them and recovered judgment, and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the Bankrupt Act.

There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the State court would have been a moral wrong and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible from this to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the Bankrupt Act?

It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the Bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency; and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an

ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law, and is essential to its successful operation.

The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the Bankrupt law is more immediately confided.

We are, nevertheless, not satisfied of its soundness.

We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by the law. It is equally clear that there is no such duty imposed by that act in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts, and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is designed to be carried so far.

As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome and, often, ruinous duty.

It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combating goes upon the hypothesis that

there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.

We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.

Many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act.

It is also argued, that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow.

The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, that he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or

completion, and is under no legal or moral obligation to hinder or prevent them.

Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids?

The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the Bankrupt Act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment.

Undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the Bankrupt Act would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication.

These latter considerations serve to distinguish the present case from that of *Buchanan* v. *Smith*,* decided at the last term, and which may seem to conflict, in some of the expressions used in that opinion, with those found in this. That was a bill in chancery involving several distinct issues of fact, on which much and conflicting testimony was given, and the contention was mainly as to what was established by the

* 16 Wallace, 277.

evidence. There was satisfactory proof that the creditor, before pursuing his remedy in the State court, had urgently sought to secure a preference by obtaining from the debtor a transfer of certain policies of insurance on which a loss was due. The case was also complicated by an assignment made by the debtor, under which the assignee took possession before the creditor procured his judgment in the State court. That case was well decided on the evidence before the court. But in the case now before us the questions we have discussed are presented nakedly and without confusion, by facts found by the court and undisputed, and we have been compelled, on careful consideration of the Bankrupt Act, to the following conclusions:

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act.

2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy is not sufficient evidence of such preference or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the Bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

These propositions require the questions certified to us to be answered as follows: The first and second in the NEGATIVE, and the third in the AFFIRMATIVE.

CARPENTER v. UNITED STATES.

One who enters into possession of land in virtue of an agreement or understanding that he is to be a purchaser of it, cannot be held liable for use and occupation if the purchase be actually concluded.

APPEAL from the Court of Claims; the case as found by that court having been thus:

In July, 1863, Major Hunt, of the corps of engineers, entered into negotiations with one Carpenter, owner of an island in Narragansett Bay, for the purchase of it by the United States for military uses; and a parol contract for the purchase and sale was then formally concluded; the terms being approved by the Secretary of War. The price, as stipulated, was $21,000. In August following, the officers of the government, with the consent of Carpenter, entered into possession of the island and began to prepare for fortifying it. *The possession then taken they have ever since retained.* Upon examination, however, it was found and so reported by the Attorney-General, that under an act of May 1st, 1820,* an executive department had by law no authority to purchase land on account of the government. Consequently the verbal arrangement with Carpenter remained unconsummated, until 1866. On the 12th of June, of that year, Congress made an appropriation for the purchase of sites then occupied, and proposed to be occupied for sea-coast defence, and on the 7th of August next following, the purchase-money of the island ($21,000) was paid to Carpenter, and *accepted by him without any claim for interest or rents, so far as it appeared, and he delivered a deed for the property to the United States.* In this state of things Carpenter now, December 7th, 1867, filed a petition in the Court of Claims, claiming compensation from the United States for the use and occupation of the island from the time the United States officers, with his consent, took possession, after the verbal

* 3 Stat. at Large, 568.

arrangement to purchase, until the deed was made and the purchase-money was paid, that is, from August, 1863, to August, 1866.

The question was whether, upon the case stated, an action for use and occupation could be sustained.

The Court of Claims, as appeared by its opinion,* considered that the law (*i. e.*, the statute of 11 George II, chapter 19, § 14) which gives the action for use and occupation always required that some contract of demise should subsist; in other words, that the relation of landlord and tenant must be established;† that there was no such relationship here. That independently of this the claim rested on an implied contract, but that where there was an express contract to buy, a contract to pay rent could not arise by mere inference. Relying on these views, and citing the English case of *Kirtland* v. *Pounsett*,‡ it accordingly decreed a dismissal of the petition. From that decree the claimant appealed.

Messrs. J. M. Carlisle and J. D. McPherson, for the appellant:

The right to sue for use and occupation does not rest, as the court below assumed, on the statute of 11 George II. It existed previously; though until the passing of the statute mentioned the plaintiff was nonsuited, if a demise was proved.§ Use and occupation may well lie without a demise.

---

* 6 Court of Claims, 162.

† It having been held in *Brett v. Read* (1 W. Jones, 329) that where there had been an actual lease, action for use and occupation would not lie, the statute of 11 George II, chapter 19, § 14, enacted that—

"It should be lawful for a landlord, where the agreement was not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, should appear, the plaintiff in such action should not therefore be nonsuited, but might make use thereof as an evidence of the *quantum* of damages to be recovered."—REP.

‡ 2 Taunton, 145.

§ Churchward *v.* Ford, 2 Hurlstone & Norman, 448.

The English case of *Kirtland* v. *Pounsett*, cited by the Court of Claims, does not apply. The report says:

"Mansfield, C. J., at first inclined to think the action might be supported; for that if a man had contracted for the purchase of an estate of the annual value of many thousand pounds, and had through the imprudence of the vendor been permitted to take possession, which he might possibly retain for several years pending the discussion of the title in a court of equity, it would be strange if the purchaser could hold possession and receive the profits during all that time without paying any consideration for it to the vendor. *But upon the ground that during all the defendant's occupation of the premises the plaintiff had been in possession of the purchase money, of which he had made or might have made interest, the Chief Justice directed a nonsuit, with liberty to move to set it aside.*"

On the motion to set aside the Chief Justice said he doubted extremely whether in any case the plaintiff could recover. If no money had been paid, he said, it might perhaps be a different question, but if one paid his money and took possession, he asked:

"Is it not just that one party should take back his money and the other take back his house?"

On the other hand, *Howard* v. *Shaw*, in the English Exchequer,* is in our favor. There the defendant had entered into possession under a valid contract to purchase, and deposited part of the price. He afterward took advantage of some dispute to demand back his deposit, and received part, but not receiving the whole kept possession, until an action of ejectment was brought against him, when he surrendered the premises. The vendor then sued for use and occupation. At the trial the point was made by the defendant that the action could not be maintained, because the relation of landlord and tenant had never existed; and the Chief Baron being of that opinion, nonsuited the plaintiff. Upon rule being moved for, to set aside the nonsuit and enter a verdict, the

* 8 Meeson & Welsby, 118.

Chief Baron said he had entertained doubts, but was satisfied the plaintiff ought to recover; that "while the defendant occupied under a valid contract for the sale of the property he could not be considered as a tenant." He goes on:

"But what is the relation of the parties when the contract of sale has gone off? The defendant remains in possession with the consent of the landlord, but without any title to or contract to purchase the land. Under these circumstances he is a tenant at will, and if the occupation is beneficial to him, that is sufficient to imply a contract to pay a reasonabe sum by way of compensation for such occupation."

Baron Parke was of the same opinion. Baron Alderson said on the point:

"While the defendant was in possession under this contract for sale, he was a tenant at will *under a distinct stipulation that he should be rent free*, therefore for that term no action for use and occupation can be brought against him, but when that contract is at an end, he is a tenant at will simply: *therefore from that time he is to pay for occupation.*"

Baron Rolfe concurred; and the rule was made absolute.

The Court of Claims, in its opinion, assumes that the defendants entered under "a contract" of purchase, and that this "contract" was finally consummated when the "statutory obstacles" were removed.

But there was no such "contract." Carpenter offered to sell the land, but there was no one to buy; no one to agree to buy. Carpenter never was bound to convey, for there was no one to whom he could be bound. The contract was not "consummated" in 1866; it was but made in 1866. Carpenter's offer was a continuing offer, which he could have withdrawn at any time, and it was not accepted till 1866. There was no statutory obstacle "removed," but statutory power was given. The act of May, 1820, was not repealed, nor its provisions suspended; they were complied with.

Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

Though it has sometimes been said that an action of debt, or assumpsit, for the use and occupation of land, can be maintained only when the relation of landlord and tenant has existed between the plaintiff and defendant, this is not strictly accurate, if it be meant that a demise must be in fact proved. It is true that the statute of 11 George II, chapter 19, § 14, enacted that the action might be sustained when a demise has been proved, but the action existed before the statute was enacted, and the only effect of the statute was to enlarge its sphere. Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of the plaintiff, without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation. In such a case, the consent of the owner to the defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise, or at least *primâ facie* evidence of a demise. This is because a demise with a corresponding agreement to pay rent, or make compensation for the use of the property, is consistent with an unexplained entry by the owner's consent, and because it is a reasonable presumption that occupation thus taken was intended to be paid for. No reason, however, for such an implication exists, when an express contract or an arrangement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose. And this is shown when the entry has been made in pursuance of an agreement to purchase, whether that agreement was in writing or in parol. Such an agreement sufficiently explains the allowed entry, without the necessity of resorting to any implication of a contract other than that actually made. Accordingly, it was ruled in *Kirtland* v. *Pounsett*,* that an action for use and occupation cannot be maintained against one who took possession under a

* 2 Taunton, 145.

contract of sale, which failed afterwards to be consummated, in consequence of the vendor's inability to make title. It is true it appeared in that case the purchase-money had been paid, and by the use of it the vendor might have been regarded as compensated for the defendant's occupation, yet C. J. Mansfield said: "A contract cannot arise by implication of law under circumstances the occurrence of which neither of the parties ever had in contemplation." The same principle was asserted in *Rumball* v. *Wright*.* And in the later case of *Winterbottom* v. *Ingham*,† the same doctrine was declared, though the purchase-money had not been paid, and the reason given was, that when the defendant was let into possession, both parties understood that he made no promise to pay rent. The holding was in the expectation that title would be made and the purchase completed. There are other decisions to the same effect. It is true that in *Howard* v. *Shaw*,‡ it was held that after a contract of sale had been rescinded, an action for use and occupation might be maintained against a defendant who had remained in possession with the consent of the owner, but without any title or contract for the purchase of the land, and that a recovery might be had for the possession retained after the contract of purchase was terminated. But he was not held liable for rent during the time the contract subsisted, and he could not have been for the obvious reason that the contract was inconsistent with any understanding that rent was to be paid. And no case can be found, it is believed, in which one who entered in virtue of an agreement or understanding that he was to be a purchaser, has been held liable in an action for the use and occupation of the land, if the purchase was actually concluded.

It is contended, however, on behalf of the present plaintiff, that the contract of purchase under which, or in the expectation of the completion of which the United States entered, and under which they continued to hold until the

* 1 Carrington & Payne, 589. † 7 Adolphus & Ellis, New Series, 611.
‡ 8 Meeson & Welsby, 118.

deed was made and the purchase-money was paid, was invalid; that until the act of Congress of 1866 was passed, no executive department had authority to purchase the island, and that, therefore, there was no legal contract for the purchase in existence until the deed was made and the price paid. But if this be conceded, it can make no difference. Let it be that neither party could have enforced the parol arrangement, it is still true that it was utterly inconsistent with any understanding that the parties contemplated the one was to pay and the other was to receive rent for the occupation of the property. The understanding of the parties is the material thing. Unless it was in their contemplation that compensation, other than the price stipulated to be paid for the transfer of the title, should be made, as C. J. Mansfield said, in *Kirtland* v. *Pounsett*, a contract to pay rent cannot arise by implication of law.

The plain common sense of the case is, that if the plaintiff was entitled to anything beyond what he has received, it was to interest on the purchase-money from the time the possession was taken until the price of the sale was paid. That he should have demanded before he delivered his deed. Not having done so, but having accepted the principal and consummated the sale, he cannot now assert that the relation in which his vendee stood to him was that of a tenant to a landlord, and recover interest in the shape of damages for the breach of an implied promise to pay rent for the use and occupation of the island. There is no room in the facts found by the Court of Claims for the implication of any such promise.

JUDGMENT AFFIRMED.

UNITED STATES v. ISHAM.

1. The words "memorandum, check," in that part of the schedule of instruments required by the statute of June 30th, 1864 (13 Stat. at Large, p. 298, § 158), to be stamped, which in the printed statute-books are printed with a comma between them, should read, "memorandum-check," with a hyphen instead of a comma.
2. In settling whether an instrument should be stamped or not, regard is to be had to its form, rather than to its operation. Though it may be a device to avoid the revenue acts, and though its operation may have the effect of avoiding them, yet if the device be carried out by means of legal forms, it is subject to no legal censure.

ON certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Michigan; the case being thus:

The act of June 30th, 1864, "to provide internal revenue to support the government," &c.,* requires certain instruments, specified in a schedule which it contains, to be stamped. The schedule is as follows:

BANK-CHECK, draft, or order for the payment of any sum of money whatever, drawn upon any bank, banker, or trust company, or for any sum exceeding $10 drawn upon any other person or persons, companies or corporations, at sight or on demand, ... 2 cents.

Bill of exchange (inland), draft, or order for the payment of any sum of money not exceeding $100, otherwise than at sight or on demand, or *any promissory note* (except bank notes issued for circulation, and checks made and intended to be forthwith presented, and which shall be presented to a bank or banker for payment), or *any memorandum*, check, receipt, or *other written or printed evidence of an amount of money to be paid on demand*, or at a time designated, for a sum not exceeding $100, ... 5 "

And for every additional $100, or fractional part thereof in excess of $100, ... 5 "

This statute being in force, the United States filed, in 1871, a criminal information in the court below against E. B. Isham, for issuing without a stamp and with intent to evade

* 13 Stat. at Large, § 158, p. 298, amended by the act of July 13th, 1866; 14 Id. 144.

Statement of the case.

the provisions of the above-quoted act, a paper in the form of a draft drawn upon one C. J. Canda. The paper, which was attached to and made part of each count of the information, was in this form:

[V.] **IRON CLIFFS COMPANY.** [FIVE.]

[1190] NEGAUNEE, MICH., Jan. 3d, 1870.

Pay to the order of .....*E B Isham, Supt.*,.....*or bearer,*

Five Dollars,

Value received, and charge to account of

To C. J. CANDA, ESQ., New York. E. B. ISHAM.

Countersigned: E. S. GREEN, Clerk.

It appeared from the testimony offered by the government, that the Iron Cliffs Company was a corporation of Michigan, situated at Negaunee, in the State just named, and engaged in mining iron-ore and in manufacturing pig-iron. It had an office at Negaunee, where its business was carried on, and a head office in New York, where its board of directors met, and its funds were kept. Isham was superintendent of the works at Negaunee, and resided there Canda was treasurer of the company, and resided in New York. The company had been in the practice of issuing paper like the instrument above set forth, in payment for labor or other debts due at the mine since January, 1868, nearly all payments of balances due for labor having been made since that time and up to 1871, when the information was filed, in it. The amount issued annually since that time had been about $100,000. The blanks were sent to Isham from New York, and signed by him as drawn. The denominations issued were of $1, $2, $3, $5 and $10. When the Iron Cliffs Company began to issue this paper, there were hardly any facilities for getting currency into the country, except taking it through one hundred and twenty miles of staging, and through a wilderness chiefly; and when it was issued, it, to some extent, went into circulation, and answered the purpose of a local currency. It was taken at a store, in which the company was interested, in payment for

goods; and by all the banks and banking-houses in that region, and sometimes paid out by them on checks. But when in the course of business it came into the hands of a bank or banker, or a merchant, it was generally retained until a considerable amount of it was on hand—say from $1000 to $2000—and then either sent to New York by express for redemption, *or Isham took it up* and gave to the holder a draft on New York for the amount. When Isham took this paper in this way, by giving the holder a large draft for it, he frequently reissued it, or paid it out again in the course of the company's business at the mine; but when it was finally paid in New York, it was cancelled and destroyed.

On this and similar evidence the following questions arose, concerning which the defendant requested the court to instruct the jury in his favor, and for a verdict of acquittal:

"1st. Whether the instrument was on its face subject to be stamped?

"2d. Whether the evidence tending to prove that Isham was superintendent of the Iron Cliffs Company, and drew the instrument in that capacity, or that Canda was the treasurer of the said company, and the instrument was drawn upon him in that capacity, or that the said paper was drawn in the course of the company's business, was relevant and admissible?

"3d. Whether, if the paper in question was made and issued with the design that it should be used as a local circulating medium, and was actually used by the holders as such, it thereby became subject to be stamped, and whether the evidence given by the prosecution, tending to prove these facts, was relevant and admissible?

"4th. Whether, assuming every fact which the evidence in support of the prosecution tended to prove, the defendant was guilty of the offence charged?

"5th. Whether the information in this case sufficiently charged any offence under the laws of the United States?"

And the following further question, upon which the district attorney requested the court to charge in favor of the prosecution:

"6th. Whether if the instrument set forth in the information and adduced in evidence was issued with the design and intent to secure time for the payment of the debt it represented, it was therefore subject to stamp duty?"

Which questions (the judges being divided in opinion upon them) were now certified to this court for its opinion.

Mr. S. F. Phillips, Solicitor-General, for the United States:

The schedule of instruments required by the act of 1864 to be stamped, includes in its second paragraph (as quoted *supra*, p. 496), "any *memorandum*, *check*, &c., or other written or printed evidence of an amount of money to be paid on demand."

The instrument under consideration is a "check." If not a "check," it is a "memorandum, or other written or printed evidence of an amount of money to be paid on demand." This would be the ordinary and popular view of the instrument, and if either a "memorandum" or "check," "or other written or printed evidence for a sum of money to be paid on demand," &c., it must be stamped.

In legal view, however, instruments which assume the form of drafts, but which are drawn by a party *upon himself*, although loosely and for general purposes, as we have said, styled *drafts* or *checks*, are, in essence, promissory notes. The case is the same where the drawer and the drawee are apparently different persons, but in truth mere agents of one person known to all parties, and acknowledged as the only debtor in the transaction. In such cases the paper is *accepted* from its origin, and the contingent liability of the drawer, so characteristic of mere checks, never arises, being merged before issue in the absolute liability of the same person, as acceptor. That such instruments are promissory notes, was decided in England in the leading case of *Miller* v. *Thomson*,* and has been sustained in several cases in this country; notably by the high commercial authority of the

* 3 Manning & Granger, 576.

Court of Appeals of New York in *Fairchild* v. *The Ogdensburgh Railroad Company.**

Now, here the evidence shows, that the drawer (Isham), payee (Isham again), and drawee (Canda) were agents of one corporation, the only debtor; and indeed that Isham himself, the drawer, redeemed the bills when they had got in considerable amounts ($1000 to $2000) in the hands of a bank, banker, or merchant.

Independently of the evidence the character of the instrument is disclosed on its face. It is there numbered 1190. It is shown to be one of a large number, of like sort, issued by a company in the region of the iron mines, engaged in dealing in iron. Isham, the drawer and payee, is styled "sup't," superintendent. Canda, designated as of New York, the source of capital, no one could doubt was a treasurer.

Alike visibly and by proofs, the transaction was a device to avoid the payment of a stamp duty, and its operation was a fraud on the internal revenue act.

Messrs. C. P. James and J. Hubley Ashton, for the prisoner, argued contra:

1st. That doubtless the words "memorandum, check," printed in the statute-book with a comma between them, were, in respect of the comma, incorrectly printed; that statutes as engrossed had no punctuation in them; that, as this court has said,† punctuation is "a most fallible standard" by which to interpret an instrument, and that the act as passed was doubtless "memorandum check." Aided by the printer, the words should have appeared "memorandum-check." This quite altered the sense.

As for the rest of the phrase, "other written or printed evidence," &c., the preceding part of the schedule having,

* 15 New York, 337; and see Hasey v. The White Pigeon Beet Sugar Company, 1 Douglass, Michigan, 193.

† Ewing v. Burnett, 11 Peters, 54; and see Ex parte Irvine, 1 Pennsylvania Law Journal, 292 and 300, where the observation was applied to a statute.

by exclusion, specifically described this instrument, the general words would not apply.

2d. That the instrument was, *in form*, a draft or order for the payment of money drawn upon a person other than "a bank, banker, or trust company," and it was for less than $10; that the stamp duty was to be regulated by *the form* of the paper; and that not being in form a promissory note, the stamp requisite for instruments which were in that form was unnecessary.

The paper, therefore, required no stamp, and the prosecution must fail.

Mr. Justice HUNT delivered the opinion of the court.

We are of the opinion that the position taken by the counsel of the defendant is correct,—that the paper issued required no stamp, and that the prosecution must fail.

The schedule of instruments required by the statute of 1864 to be stamped, designates the various instruments and writings to be taxed by the well-known names and descriptions of the paper, and specifies the amounts of duty in substance as follows:

1st. Every bank-check, 2 cents.

2d. Every draft or order for the payment of any sum of money *at sight or on demand* (except where the draft or order is so drawn on a person, company, or corporation other than a bank, banker, or trust company, and for a sum not exceeding $10), 2 cents.

3d. Every bill of exchange, draft, or order for the payment of any sum of money *otherwise* than *at sight or on demand*, for every $100, 5 cents.

4th. Every promissory note, for each $100, 5 cents.

5th. Every memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand or at a time designated, for a sum not exceeding $100, 5 cents.

6th. If the draft or order is drawn on a person not a banker, or a bank or a trust company, and does not exceed $10, then no stamp is required.

There is probably an error in the punctuation of the statute in regard to the item which reads, "memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid." It should read "memorandum-check (with a hyphen between the words), receipt, or other written or printed evidence." A "check" was specifically provided for already in the schedule, and it is not to be assumed that Congress would, in the same schedule, make two provisions, differing from each other, for the same subject. A memorandum-check, however, is an instrument well known in the commercial law, which, it might be claimed, did not come under the general term of a check, and which, therefore, had not been specifically provided for. A memorandum-check is in the ordinary form of a bank-check, with the word "memorandum" written across its face, and is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder.

Mr. Parsons, in his work on Notes and Bills,* says: "It has been said that the word 'memorandum,' or 'mem.,' written on the check would not affect the right of the holder. We think this might have been doubted, because there is a well-known custom in all our commercial cities of drawing and using checks in this form merely as due-bills, or as what they are, and are called 'memorandum-checks.'"

In *Dykers* v. *The Leather Manufacturers' Bank*,† it was said: "The weight of the testimony is, that this memorandum amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank, where he has not provided funds to meet the draft."

It is stated further in Parsons,‡ that the holder *may* present the same for payment, if the name of the bank is not cancelled on the check.

In *Franklin Bank* v. *Freeman*,§ the court speak of memo-

* Vol. 2, p. 66.
† 11 Paige, 615.
‡ *Supra.*
§ 16 Pickering, 535.

randum-checks as well known in Boston, and say that the rules of business with regard to them are well understood.

In *Glover* v. *Graeser*,* it is said that memorandum-checks, being regular bank-checks with the word "memorandum" written on their face, are constantly used in settlement of accounts between merchants, as admissions of amounts of money due.

This reading makes the statute harmonious and sensible, providing for bank-checks, drafts, inland bills, promissory notes, memorandum-checks, receipts, and assigning to each its proper position.

It is said that in many instances the statute refers to the same subject more than once, under different names, and with different rates of duty, and that embarrassment in the construction of the statute may arise from this cause. Thus a check, whether drawn upon a bank or an individual, is in the nature and form of an inland bill of exchange, having a drawer, a drawee, and usually a payee. The statute describes checks, drafts, and promissory notes, and subsequently speaks of a memorandum-check; also of a receipt or other written or printed evidence of an amount of money to be paid. These general terms plainly include the specifications already made. A bank-check, a memorandum-check, a draft, or a bill of exchange each furnishes written or printed evidence of an amount of money to be paid. So does a promissory note. A note is, indeed, the regular and usual evidence in dealings between men, that money is to be paid, whether in cities or in the country, and whether the transactions be limited or extensive; and yet, bank-checks and drafts, or orders at sight or on demand, require different stamps from memorandum-checks, bills of exchange, and promissory notes.

A few simple rules will dispose of the most of the difficulties that may arise:

1st. Instruments described in technical language, or in

* 10 Richardson's Equity, 446.

terms especially descriptive of their own character, are classed under that head, and are not to be included in the general words of the statute.

2d. The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation, except where scientific or technical terms are used.

3d. The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.

4th. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Girr* v. *Scudds*,* "a tax cannot be imposed without clear and express words for that purpose."

These principles are based in good sense, and are sustained by the authorities.

In *Williams* v. *Jarrett*,† where the question was, whether a bill was liable to the stamp duty imposed upon bills "exceeding two months after date," it was held, that the date meant the time expressed on the face of the bill, and that it did not depend upon the fact that the bill actually had more than two months to run. Denman, C. J., says: "If a bill bears no date, we must ascertain by evidence the day when it issued, but where there is a date, that must be considered as the time to which the schedule refers."

In *Whistler* v. *Forster*,‡ the same language is used by Erle, C. J., and by Willes, J. The latter says: "Drafts payable to order, not being affected by either of those enactments, fall within the law as to bills of exchange, which have been repeatedly held not to be void by post-dating, though that

* 11 Exchequer, 191; see also Conroy v. Warren, 8 Johnson's Cases, 259 to the same effect.

† 5 Barnewall & Adolphus, 32.

‡ 14 Common Bench (New Series), 257.

should have the effect of making the instrument require a less stamp than if it had been dated correctly and payable at the same time."

In *Bull* v. *O'Sullivan*,* decided in 1871, the cases of *Whistler* v. *Forster*, and *Williams* v. *Jarrett*, are approved, and the rule is thus announced: "There is nothing in the statutes to invalidate a post-dated check on a banker payable to order on demand, and in determining what is the requisite stamp to make such an instrument admissible in evidence, the instrument alone is to be looked at. Such a check is available in the hands of a person who took it with knowledge that it was post-dated, and is admissible in evidence with only a penny stamp." Hannan, J., further says: "We are of opinion that the stamp acts above referred to, so far as they relate to bills of exchange and orders for the payment of money, deal with those documents only as they appear on their face, without reference to any collateral agreement or condition by which their apparent operation may be affected."

It is not necessary, in this view of the case, to decide whether an order drawn by one officer of a corporation upon another officer of the same corporation is in law a promissory note, nor whether it may simply be treated as such in pleading; nor is it necessary to decide whether the fact that the order is drawn upon Mr. Canda individually, and not as treasurer of the corporation, will affect the result. Whatever may be the law on this subject, it will not affect the case before us. The instrument we are considering is, in form, a draft or check upon an individual. It is not in form a promissory note. It must, therefore, pay the stamp duty of a draft or order, and not that of a promissory note. It is not permissible to the courts, nor is it required of individuals who use the instrument in their business, to inquire beyond the face of the paper. Whatever upon its face it purports to be, that it is for the purpose of ascertaining the stamp duty. The paper here, as we have said, has the dis-

* Law Reports, 6 Q. B. 209.

tinctive form of a draft or check upon an individual. It falls under that specific description, and is to be taxed according to that description, not varied by proof, and not ranked under any general terms contained in the statute.

It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. This may be true, and if not true in fact in this case, it may well be true in other instances. To this objection there are two answers:

1st. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank-check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

Another answer may be given to the objection, more comprehensive in its character. It is this: that the adoption of a rule that the form of the instrument can be disregarded, and its real character be investigated for the purpose of determining the stamp duty, would produce difficulties and inconveniences vastly more injurious than that complained of. Such a rule would destroy the circulating capacity of bills, or drafts, or orders. The present act imposes the same stamp duty upon inland bills of exchange and promissory notes, but this is an accidental circumstance only. Suppose that the draft is made subject to a tax of five cents on the

hundred dollars, and the note to a tax of ten cents on the hundred dollars. The defendant contends that a draft or bill drawn by one officer of a company upon another officer of the same company, is, in legal effect, a promissory note. Upon the supposition thus made, its real character would require a tax of twice the amount of that indicated upon its face, and if the stamp be too small, the instrument is absolutely void from its inception.* In the language of the statute, it shall be "deemed invalid and of no effect."

Is every man to whom a paper in the form of a bill of exchange is presented, bound to inquire whether there are not outside circumstances that may affect its nature? Having ascertained this, is he bound to delay all proceedings until he can take legal advice upon its nature and character? This he must do upon the theory contended for, and he must be certain, also, that his advice is correct; otherwise he will lose the money he advances upon the bill. The same rule, it is contended, will apply where the drawee does not appear upon the face of the bill to be an officer of the company. Such is the case before us, where Mr. Canda, the drawee, does not appear upon the bill itself to be connected with the company, and yet the prosecution contends that it may be proved that he is its treasurer, and that thereupon the instrument ceases to be a draft or order for the payment of money, and becomes a promissory note.

That the rule contended for is impracticable in a commercial country is too obvious to require farther illustration. We are satisfied that the principles heretofore laid down must govern the case before us.

These views require that an answer in the negative should be given to each of the questions certified to this court. They are accordingly so answered, and the record must be returned to the court below with directions to

DISMISS THE INFORMATION.

* Stat., § 158.

PACKET COMPANY *v.* MCCUE.

A man standing on a wharf was hired by the mate of a boat desiring to sail soon, and which was short of hands, to assist in lading some goods, which were near the wharf, he not having been in the service of the boat generally though he had been occasionally employed in this sort of work. He assisted in lading the goods, an employment which continued about two hours and a half. He was then told to go to "the office," which was *on* the boat, and get paid. He did so, and then set off to go ashore. While crossing the gang-plank, in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries.

On a suit under a statute, by his administratrix, for the injuries done to him—the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured—the defence was that he had remained in the service of the boat till he got completely ashore, and that the injuries having been done to him by his fellow-servants, the owners of the boat (the common master of all the servants) were not liable. There was no dispute as to the facts, unless the question as to when the relationship of master and servant ceased was a fact. This question the court left to the jury. *Held* that there was in this no error.

ERROR to the Circuit Court for the Eastern District of Wisconsin. The case was thus:

Patrick McCue was a common laboring man, living in Prairie du Chien, Wisconsin, and employed in the railroad warehouse in that place. On the evening of the 11th of July, 1868, the steamer War Eagle, owned by the Northwestern Packet Company, arrived at the landing in Prairie du Chien for the purpose of taking freight from the warehouse. Being short of hands, the mate of the boat went to the warehouse, and *there* employed McCue and four or five other persons to assist in carrying freight from the warehouse and putting it on board the boat. This employment continued about two hours and a half, at the end of which time McCue and the rest were told to go to "the office" upon the boat (the packet company having no office on shore for the purpose of making such payments) and receive their pay.

Statement of the case.

They proceeded there accordingly, were paid, and then started to go ashore. As McCue was going ashore, the men on board the boat pulled in the gangway plank while he was on it. He was thus thrown down against the dock and injured, and a few days afterwards died from the injury thus received.

Hereupon Mary McCue, his widow and administratrix, brought suit in the court below, under a statute of Wisconsin, to recover damages for the injuries which he had sustained.

The *narr.* alleged that McCue had never before been, either generally or at intervals, a servant of the packet company, and that at the time when the injuries occurred and the cause of action accrued he was not so; but that contrariwise he had been employed by the company to work for it on this occasion alone, and "for a short space of time, to wit, for the space of one hour;" that this time had elapsed; that the work had been done, and that McCue had been paid for it, and that *after* all this, and *after* the relation of master and servant had thus ceased, and McCue was attempting to get off the boat, and using due care, &c., "the defendant and its agents then and there," regardless of their duty, recklessly and without any reasonable cause, pulled in and from under his feet, &c., the gangway plank, &c., by which he fell and was injured, &c.

The defendant pleaded not guilty.

There was no doubt from the evidence that McCue was without fault, and that the injuries which caused his death were owing to the reckless carelessness of the servants of the packet company.

On the trial it appeared that McCue had before been occasionally employed by the packet company in the same way in which he had now been; but there did not seem to be any evidence that he was in their general employment: and this was the first time in the year 1868 in which he had been employed in this sort of work by the company.

The counsel of the packet company insisted, as the hiring was in the warehouse, as McCue had proceeded thence,

as the freight was to be carried thence, and as the packet company had no office on shore or anywhere else than the office *upon* the boat, where McCue could be paid, that his relationship to his employers had not terminated by the simple fact of his getting his money at the office on the boat, but, on the contrary, continued until he got back to the warehouse, or at least and rather until he had got off the boat; that until such latter time he was the servant of the company, and that the injuries done to him having been done to him by his fellow-servants of the company he could not recover from their common master, the packet company.

The counsel of the company therefore requested the court to charge according to this view, and as matter of law upon the conceded facts that the plaintiff could not recover.

The court declined so to charge, and charged thus:

"McCue had been occasionally employed by the defendants' boats in the way in which he was in this instance; but there does not seem to be any evidence to show that he was in their general employment, and in this particular year it would appear that this was the first time he had been employed in this way, so that he was employed for a special purpose, which being accomplished, the agreement or contract ceased.

"The contract was made in the warehouse, the freight was there, the execution of the contract began there, and as soon as the last portion of the freight was carried on board of the boat, the contract terminated, unless, indeed, it continued because he was to be paid off and had the right to go ashore from the boat, and to be provided with the proper means of going ashore, so that in one sense it is true, I suppose, that the contract began on shore and was terminated by the act of going on shore by McCue.

["At the same time it may also be said that as soon as he did the last work he was required to do, and was paid off, that he was after that his own master with respect to the contract made between them; that then it was optional with him to do just as he chose.

"Therefore it will be left to the jury to say whether there was the relation of servant and principal or master, as between

the deceased McCue and the defendant, at the time of the injury. And I am not now prepared to say, even if it were true that the relation of servant and master did subsist, that then the action could not be maintained, and I would like to have you find, gentlemen (inasmuch as it may be a material point, and of service hereafter), whether, as a matter of fact, there was or not a termination of the employment between the company and the deceased prior to or at the time of the injury. The counsel for the defendant insists that this is a question of law under the conceded facts; that, inasmuch as soon as McCue was paid off he immediately proceeded to go on shore and was in the act of going on shore, that constituted a part of the service. But as the court thinks, for the reason that as soon as paid off, McCue was his own master, and had the entire control and disposition of himself, to remain on board or go ashore, just as he pleased, in one aspect it may be said that the service was terminated. That question, however, the court leaves to the jury, and asks them to find what the fact is, from the evidence, on this point.

"Then, gentlemen, leaving the questions of fact to the jury, it will be for the jury to say under the evidence whether the plaintiff has made out his case as stated in the declaration. If the service was terminated and this injury was the result of the negligence of the servants of the defendant, then the plaintiff may recover."]

The jury having found a verdict of $2800 for the plaintiff, and judgment having gone accordingly, the packet company brought the case here on exceptions to the refusal to charge as requested, and to those parts of the charge within brackets, as given.

Mr. J. P. C. Cottrill, for the plaintiff in error (a brief of Mr. J. W. Cary being filed on the same side):

1. A master is not responsible to those in his employ for injuries resulting from the negligence of a fellow-servant engaged in the same general business; and this is so although the grades of the servants are different, and the person injured is inferior in rank and subject to the directions and general control of him by whose act the injury is caused. Neither is it necessary that the servants—the one that suffers

and the one that causes the injury—should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes. This rule, in the full extent in which we state it, is one supported by authorities perfectly known to all. Its application to this case is plain, if the relationship of McCue was not terminated by the act of his receiving his pay at the office on the boat; the captain's office, we suppose.

2. It was not so terminated. The engagement with McCue was on shore. His relation of servant there made continued until he finally got back to shore. If not, what relation did he sustain to the owner of the boat between the moment that he got his pay and that in which he was in the act of finally going ashore? He was not a passenger. He was not a trespasser. Having lawfully entered upon the boat as a servant, and being required to leave it at the end of the service, he would still be a servant until he had finally quit the boat. One of the risks which he assumed in entering upon his employment was his passage over the gang-plank, in going to and from the boat, in loading the freight. Can it be said that he did not assume this risk in passing over it, when finally leaving the boat, as much as he did at any other time when passing over the same plank, in the course of his employment? Those in charge of the boat were in duty bound to permit him to go ashore after he had finished carrying freight. They were bound to furnish him with the means of going ashore. And he was himself bound by the contract which he had made to go ashore. He could not have remained on the boat under the contract which he had made, and to have been entitled to remain there he would have been obliged to make some other contract. His contract of service, therefore, did not terminate until he got ashore.

3. The court left it to the jury to determine as a question of fact whether or not McCue, at the time he was injured,

was a servant of the packet company; whether there was or not a termination of the employment between him and it prior to or at the time of the injury.

This was an error. The question was purely one of law. The facts were all undisputed and conceded. It was conceded that McCue was hired by the mate on shore to assist the crew in carrying freight from the warehouse to and upon the boat over the plank, and that he did so assist; that as soon as he deposited his last load of freight on the boat, he was directed to go to the office on the boat and get his pay; that he went and got his pay and immediately thereafter started to leave the boat by passing over the plank, and that while he was upon it, passing to the shore, it was hauled in by the crew and he was thrown against the dock and injured. It was further undisputed that the packet company had no office or place on shore for paying its servants, and that the only place for paying them was at the office on the boat. So of all the facts; all were undisputed and conceded. Now, on such a case, it was the duty of the court to determine as a question of law what the relation was existing between the packet company and McCue at the time he was injured, and it was error to leave this question to the jury.*

Messrs. Matthew Hale Carpenter and G. W. Lakin, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted on the part of the plaintiff in error that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant engaged in the same general business. Whether this general proposition be true or not it is not necessary to determine in the state of this record. It is conceded, if the employment of McCue by the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact.

* Parks v. Ross, 11 Howard, 372; Besson v. Southard, 10 New York, 240; Storey v. Brennan, 15 Id. 526; People v. Cook, 4 Selden, 67.

But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened.

We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defence, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had the right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defence at the best was a narrow one, and in our opinion more technical than just.

JUDGMENT AFFIRMED.

[See Railroad Company v. Fort, *infra*, p. 553.]

GOODWIN *v.* UNITED STATES.

In August, 1865, at the close of the rebellion, A. chartered a vessel to the United States, at a fixed sum per day, to carry military stores from Wilmington, North Carolina, to the city of New York, A. warranting her to be then "tight, staunch, and strong," and agreeing that while in the service of the government she should be kept so, and that the time lost by her not being so should not be paid for by the government; "the war risk to be borne by the United States, the *marine risk by the owners.*" On her voyage she sprung a leak and put into the island of St. Thomas, raised money there on a bottomry bond, and with it was repaired. Arriving in New York, and the bottomry bond not being paid, the vessel and cargo were libelled by the holder of the bond, attached by the marshal, and retained by him from the 10th of March to the 30th of July, a space of one hundred and forty-four days; when a decree was made against the vessel, and the cargo was liberated. The vessel was discharged from the service of the United States on the 7th of August following.

On a suit in the Court of Claims by A. to recover the per diem of $50 a day, for the one hundred and forty-four days, during which the vessel was detained by the marshal, *held* that the United States was not liable for a per diem during that term; that the detention was incident to the "marine risk," which the owner had expressly assumed, and that the United States not having been blameworthy, there was nothing to shift the burden from the party on whom the contract placed it.

APPEAL from the Court of Claims, in which court one Goodwin, who had chartered a schooner to the United States, at a fixed per diem, sought to recover the per diem during one hundred and forty-four days in which, under the circumstances hereinafter mentioned, the vessel had been detained by the marshal of the United States on a libel filed against her.

The Court of Claims dismissed his petition, and Goodwin took this appeal.

Mr. T. J. D. Fuller, for the appellants; Messrs. G. H. Williams and C. H. Hill, contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

The charter-party out of which this controversy has arisen

is dated on the 26th of August, 1865. It stipulates, among other things (1), that the schooner was then, and while in the service of the government should be kept, "tight, staunch, and strong," at the cost of the owners, and that the time lost by any deficiency in these respects should not be paid for by the United States. "The war risk to be borne by the United States, the marine risk by the owners." (2) The United States agreed to pay $50 per day for the time the vessel was engaged in their service.

On the 17th of November, 1865, pursuant to the charter-party, the schooner left Wilmington, in North Carolina, for the port of New York, laden with ordnance and ordnance stores. On her way she sprung a leak and was compelled to bear away and put into the port of St. Thomas, in the West Indies, for repairs. There the captain executed a bottomry bond, binding the vessel and cargo, and amounting, principal and interest, to $17,399.71. Having received the necessary repairs the vessel left St. Thomas on the 26th of January, 1866, and reached New York on the 13th of February ensuing. There, the bottomry bond not being paid at maturity, the vessel and cargo were libelled in the District Court, and, on the 10th of March, they were attached on that proceeding. The District Court dismissed the libel. An appeal was taken to the Circuit Court. That court affirmed the decree as to the cargo but reversed it as to the vessel, and finally decreed against the latter for the amount due on the bond. The vessel was held by the marshal under the attachment from the 10th of March until the 30th of July. She was discharged from the service of the United States on the 7th of August.

A claim was made against the United States in general average. It was adjusted and paid to the satisfaction of the owners. All the per diem compensation claimed has also been paid except that for the time the vessel was in the hands of the marshal. Whether the claim for general average, and that for the time lost by the vessel in deviating from her course, going to St. Thomas, there awaiting repairs, and going thence to her port of destination, were not

covered by the marine risk she had assumed, are questions not before us, and which we need not, therefore, consider.

The claim of per diem compensation for the time the marshal held the vessel, is the only ground of controversy between the parties, and it is the only subject open for examination in this case.

During that time, she was in the custody of the law, she was in no wise in the employment of the United States nor subject to their control. She did not, and could not render them any service while thus held.

The United States had not stipulated to pay in such a contingency. On the contrary, the detention was incident to the marine risk which the owners had expressly assumed. It was a fruit of that peril. The United States are not blameworthy, and not responsible. The contract puts all such burdens upon the shoulders of the owners. Those burdens cannot be shifted and thrown upon the other party.

JUDGMENT AFFIRMED.

CUTNER v. UNITED STATES.

1. A sale made without "a license to trade," by a loyal citizen of the United States, on the 6th of March, 1865, when Savannah was occupied by the Federal troops, to a loyal citizen of New York, of cotton which had been returned by the owner, registered, and taken into possession by the United States, and sent for sale to New York under the Captured and Abandoned Property Act, *held* void, although the bill of sale of the cotton authorized the attorney of the vendors to receive the proceeds of sale and pay them to the vendees, and was thus argued to have been not a sale of the cotton at Savannah, Georgia, but a sale of claim in Washington, D. C. This was apparently decided under the act of July 13th, 1861, prohibiting and making unlawful "all commercial intercourse between the inhabitants of any State proclaimed to be in a state of insurrection against the United States, and the citizens of the rest of the United States, so long as such condition of hostility should continue;" and the act of July 2d, 1864, making the prohibition applicable to all commercial intercourse to persons being within districts within the lines of National military occupation in such States.

Statement of the case.

2. *Held* further, the full consideration-money of the purchase having been paid, that the vendor could not sustain a suit in the Court of Claims for the proceeds of the cotton, for the use of the vendee; that the vendor was not entitled to sue for himself, because he had been paid in full; nor entitled to sue for his vendee, because the sale was unlawful and void.

APPEAL from the Court of Claims; the case as found by that court was thus:

Cutner, a loyal citizen of the United States, resident at Savannah, Georgia, one of the States which went into rebellion, was, on the 21st of December, 1864, the owner of thirty bales of cotton. On the day just named Savannah was captured by the army of the United States. On the 23d of February, 1865, Cutner reported his cotton to the commanding officer, and it was registered, in compliance with general military orders, by the Treasury agents in his name; and on the 3d of March following taken into the custody of the Treasury agents of the United States and shipped to New York, and there sold by the United States; the net proceeds, amounting to $6897, being paid into the Treasury.

On the 6th of March, 1865, Cutner executed a bill of sale of the cotton specifically, and describing it as "all that certain lot and quantity of cotton, viz., thirty bales of cotton, marked S. C.," to Schiffer & Co., of New York, and received at the time, from one Stewart, the attorney and agent of Schiffer & Co., $2250, the entire consideration named in the bill of sale. The bill of sale recited that the cotton sold was the same which he, Cutner, had described in a petition of March 6th, 1865, to the President of the United States; and it authorized Stewart, the attorney, "to pay over to Schiffer & Co. any and all proceeds which may arise from the same when sold." At the time of this sale Schiffer & Co. had no license to trade with the enemy.

By act of July 13th, 1861,* it was enacted, that "all commercial intercourse" between the inhabitants of any State, or any section, or part thereof, who the President should declare "were in a state of insurrection against the United

* 12 Stat. at Large, 257.

States," and the citizens of the rest of the United States should "cease and be unlawful so long as such condition of hostility shall continue."

By proclamation of August 16th, 1862,* the President declared the State of Georgia to be in such state of insurrection.

By the act of July 2d, 1864,† the prohibitions upon commercial intercourse with the territory in rebellion, are made to apply "to all commercial intercourse by and between persons residing or *being* within districts within the present or future lines of National military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection, and not within those lines."

It was not denied by Cutner, or Schiffer & Co., or at the bar, that the sale had been made in Savannah.

In this state of things Cutner, suing for the use of Schiffer & Co., filed a petition in the court below, under the provisions of the Captured and Abandoned Property Act, asking for restitution of the proceeds of the cotton in the Treasury.

The Court of Claims held:

1. That Schiffer was the real and beneficial claimant in this suit, although Cutner was the nominal one.

2. That the pretended transfer of the cotton by Cutner to Schiffer, on 6th March, 1865, was in violation of the non-intercourse acts of Congress and the President's proclamations made subsequent thereto, and therefore inoperative to clothe the real claimant, Schiffer, with a valid title to the cotton, or to vest in him a right to the proceeds thereof.

The court accordingly dismissed the petition. Hence this appeal.

Messrs. A. G. Riddle and A. L. Merriman, for the appellant:

There was no violation of the law restricting commercial intercourse in this transaction. However the subject of

* 12 Stat. at Large, 1262.

† 13 Id. 376, § 4.

sale is described in the bill of sale, the property sold was a claim against the United States for thirty bales of cotton or the proceeds of them, and, as a matter of course, was situated at the seat of government. Then the purchasers were loyal citizens of a loyal State, and being such, could not be presumed to have intended to send the fruits of such contract to the aid of the insurrectionary government, even if it were possible (which it was not) to have obtained the subject-matter of the trade from the government before sale thereof.

Messrs. G. H. Williams, Attorney-General, and C. H. Hill, Assistant Attorney-General, contra:

In any view the sale was unlawful. The State of Georgia, in which Savannah was, had been declared by a proclamation of the President, "in a state of insurrection against the United States." Though occupied by our forces, the "state of hostility still continued." The case comes, therefore, within the act of July 13th, 1861. It comes also within the later act of July 2d, 1864; for the sale and purchase—the "commercial dealing"—was made "with each other" by and between parties "being within districts within the lines of National military occupation, in a State declared in insurrection."

Mr. Justice BRADLEY delivered the opinion of the court.

Intercourse between the inhabitants of the two belligerent sections was still prohibited when this sale was made. It was, therefore, clearly illegal, unless Schiffer & Co. had a license to trade in Savannah, which the case expressly finds they had not. The sale being illegal, the suit cannot be sustained for the benefit of the vendees. It cannot be sustained for Cutner's own benefit, because he received the full consideration of the cotton and has no interest remaining.

DECREE AFFIRMED.

BOARD OF PUBLIC WORKS v. COLUMBIA COLLEGE ET AL.

1. A personal judgment, rendered in one State against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the State where rendered of any personal liability to the plaintiff of the parties proceeded against by publication.
2. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit.
3. No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. So held in a case where a party, relying upon a decree of an inferior State court, objected to the character given to the decree as interlocutory by the highest appellate court of that State, and insisted that it should be treated as a final decree.
4. A court of equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property.
5. This rule should be insisted upon with rigor whenever the property sought to be reached constitutes assets of a deceased debtor, which have already been subjected to administration and distribution; and some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution.

APPEAL from the Supreme Court of the District of Columbia.

This was a suit in equity to reach property belonging to the estate of a deceased debtor, and have it applied to the demand of creditors, and particularly funds distributed by the executor of the estate of the deceased to legatees.

The facts of the case were as follows:

In July, 1853, the firm of Selden, Withers & Co., which was engaged in the business of banking in the city of Washington, entered into a contract with the Board of Public Works of Virginia, to sell on its account certain bonds of

the State of Virginia, which had been issued for public improvements. In pursuance of this contract, the firm received from the complainant at different times bonds of the State amounting to over $4,000,000. In November, 1854, the firm suspended payment, being in insolvent circumstances, and made an assignment of its partnership assets to trustees for the benefit of its creditors. It was at the time indebted in a large amount to the complainant for the proceeds of bonds sold and not accounted for. The firm consisted of five partners, named Selden, Withers, Latham, Bayne, and Whiting; the two former having been of Alexandria, Virginia, the others mostly of Washington.

In December following, the said board instituted an action in the Supreme Court of the State of New York, against the members of the firm, to compel them to account for bonds deposited with them, and to pay the proceeds received from their sale. In this action personal service of process was made upon two of the partners, Latham and Bayne. Whiting, another partner, voluntarily appeared by attorney. The other two partners, Selden and Withers, were not personally served, and did not appear in the action. Being non-residents of the State, only a constructive service by publication was made upon them. The answer of Bayne, which was filed in 1856, alleged various set-offs, and (referring to the general assignment of the partnership in 1854, and to that of Withers in 1855) set up for a further and separate defence, that since the filing of the bill there had been assigned to the said Board of Public Works, or to persons for it, bonds, real estate, and other property (which it alleged that the said board had accepted and received), to an amount sufficient to extinguish and satisfy the balance. The action proceeded on the pleadings to judgment, which was rendered in March, 1857, against all the partners for upwards of $500,000, including the allowance to the attorneys and costs.

In January, 1855, the defendant Withers, professing a desire, so far as he was able, to furnish sufficient security out of his private means for any balance of the debt of the firm

that might remain unsatisfied from the partnership assets, conveyed to Bocock, the Attorney-General of Virginia, and one Wylie, a resident of that State, in trust for that purpose, certain real property situated in Alexandria, Virginia, and in St. Louis, Missouri, and certain shares in the Cumberland Coal Company. The nominal value of the property thus conveyed exceeded $250,000.

In September, 1858, the said board instituted a suit in equity in the Circuit Court of Alexandria County, in Virginia, against the members of the firm, their assignees, and the trustees, Bocock and Wylie, to obtain a decree against all the partners for the amount due from them, and for the sale of the property conveyed by Withers to Bocock and Wylie, and the application of the proceeds to the payment of the debt. In this suit two of the partners, Selden and Withers, were personally served with process; the other partners being non-residents of Virginia, were proceeded against by publication. Withers filed an answer, setting up, among other things, the recovery by the complainant of the judgment in the New York Supreme Court against his copartners upon the same causes of action, insisting that those causes were merged in that judgment; and also that the partnership assets in the hands of the assignees exceeded in amount the indebtedness of the firm, and that his individual property conveyed to the trustees, Bocock and Wylie, could not be subjected to sale until the trusts of the deed to the assignees were fully executed. This defence does not appear to have made much impression upon the Circuit Court, for on the same day on which the answer was filed, it rendered its decree that the complainants recover against all the partners, as well against those brought in by publication as those personally served, the sum of $513,615; this sum having been ascertained and reported as due from them by a commissioner previously appointed in the case. The decree, which was made June 1st, 1860, was accompanied by a direction that unless the amount was paid before the 1st of December following, the property conveyed by Withers to the trustees, Bocock and Wylie, should be sold and the

proceeds applied thereon; and commissioners were designated to make such sale.

From this decree Withers filed a petition to the Supreme Court for an appeal. But the appeal was denied, "the court being of opinion that the decree being interlocutory, no execution can issue without the order of court; and deeming it most proper that the case should be proceeded in further in the court below before an appeal is allowed."

In the year 1860, Withers removed his residence from Alexandria, in Virginia, to the District of Columbia, and in November, 1861, died there, leaving a will, which was insufficient to pass real property, but was sufficient to pass personal estate. The will was admitted to probate in the Orphans' Court of the district, and letters testamentary were issued thereon to English, the only one of the executors named in the will who qualified.

Under this will there were several legatees, among whom were the President of Columbia College (in trust for the college), Elizabeth Madden and Attie Gulick.

In 1865 the legatees filed a bill in the Supreme Court of the District to compel the executor to account for and distribute the personal estate in his hands. The executor appeared and answered, and the cause was referred to an auditor to take an account of the personal property of the testator, and of the debts against the estate, and of the balance distributable to the legatees and next of kin. The auditor having by advertisement called on persons having claims against the estate to present them to him, made a report accordingly, reporting distribution among the legatees and next of kin. The report was confirmed, and in April, 1866, the Board of Public Works of Virginia not having in any way appeared or made any claim before the auditor, or in the Orphans' Court of the District of Columbia (a tribunal having jurisdiction over the estates of decedents in the District), a decree was entered directing distribution, which was accordingly made.

The will, as already stated, was insufficient to pass real property, and an interest in such property situated in the

District, belonging to the deceased, vested, accordingly, in his heirs.

In 1856 the deceased had conveyed a parcel of land, situated in the District, to Columbia College for the nominal consideration of $18,000.

In this state of things the Board of Public Works of Virginia filed, in July, 1867, the present bill against the executor of Withers, his heirs at law, and legatees, among whom were Columbia College, Madden, and Gulick, to reach the real property of the deceased which did not pass under the will, but which vested in his heirs; to set aside the deed to the college, on the alleged ground that it was made without consideration, whilst the deceased was insolvent, with intent to defraud the complainant; to charge the executor for the assets which came into his hands, and which he distributed to the legatees under the decree of the Supreme Court of the District, on the ground that he was informed of the debt to the complainant, and failed to bring it to the notice of the court directing the distribution, and to compel the legatees to refund the amounts received by them.

Columbia College, Madden, and Gulick (these last two with their husbands) alone answered the bill. In their answers they negatived its material allegations and relied upon the non-joinder of the surviving partners of Withers, and the statute of limitations. They also contended that the demand against Withers was merged in, and extinguished by, the judgment of the Supreme Court of New York; that the decree of the court of Virginia was interlocutory and not final, and that the distribution under the decree of the Supreme Court of the District afforded a complete protection to the executor and legatees.

A replication was filed to the answers, and the case was heard upon the pleadings without any proofs. The court dismissed the bill without prejudice, and the complainant appealed.

The defendants, in their answer, disclaimed any knowledge or information touching the alleged interest of the

deceased in real property in the District which did not pass under his will, and, by consent of parties, a decree was entered for its sale. The answer of Columbia College showed that the deed to that institution, executed by the deceased in 1856, was made in part payment of a bond given as far back as 1852, and which became payable in July, 1853, before the suspension of Selden, Withers & Co., and before that firm was in failing circumstances; and the attempt to reach the property appeared to have been abandoned by the complainant. On the argument no decree was asked respecting it, nor was any allusion made to it. And from the failure to press the charge made against the executor personally, and to present any evidence of neglect of duty on his part, that ground of relief would also appear to have been abandoned. In his printed argument in this court the counsel of the complainant stated, that the only question really controverted and decided in the court below was the liability of the above legatees to refund the amounts received by them to be applied on the demand of the complainant. And that question was the only one for determination on this appeal.

Mr. W. S. Cox, for the appellant, argued that the case brought in 1854 in the Supreme Court of New York was, of course, founded on the existence of a debt due by Selden, Withers & Co. to the Board of Public Works of Virginia; that except on pleadings showing it, no such judgment as was given could have been given; that the decree of the Circuit Court of Alexandria County, Virginia, made in 1860, was equally conclusive; that it terminated in a decree ascertaining a clear balance, and decreeing unconditionally that the board recover of all the partners the sum of $513,615; that such a decree was a final decree according to the Virginia decisions,* and must be treated as conclusive in other States.†

* Harvey v. Branston, 1 Leigh, 108; Thorntons v. Fitzhugh, 4 Id. 209; Dunbar's Executors v. Woodcock, 10 Id. 629.

† Mills v. Duryee, 7 Cranch, 481.

Assuming thus, he argued further that it was a settled doctrine of equity that the creditors of a deceased person had a right to pursue assets in the hands of legatees, and this law was recognized in this court,* as generally elsewhere.

Mr. W. D. Davidge, contra, for Columbia College, argued that independent of numerous technical objections, which he specified,—including among them and prominently the statute of limitations, and non-joinder of the surviving partners of Withers,—that neglect of the complainant to give notice to the executor of Withers, or to notify its claim to the auditor when about finally to distribute the fund, alone required the dismissal of the bill below, and the affirmance of the decree which dismissed it.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

As preliminary to the inquiry whether any grounds are disclosed in the case for the interposition of a court of equity, the existence of an undisputed debt by the deceased must appear. The existence of such a debt is affirmed upon the admission of the pleadings of the indebtedness, in 1854 and 1855, of the firm of Selden, Withers & Co., and upon the decree of the Circuit Court of Virginia, in June, 1860.

Whether the indebtedness of that firm was merged in the judgment of the Supreme Court of New York, and the personal claim against Withers was thus extinguished, as contended by counsel, it is unnecessary to determine. It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that State without service of process upon him, or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the State where rendered. Their effects are merely local. Out of the State they are nullities, not bind-

* Riddle v. Mandeville & Jameson, 5 Cranch, 322.

ing upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the State courts.

The judgment in New York, it is true, is a joint judgment against all the partners, against those summoned by publication as well as those who were served with process or appeared, but this joint character cannot affect the question of its validity as respects those not served. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit.*

The indebtedness of the firm of Selden, Withers & Co., to the complainant in 1854 is, it is true, admitted by the pleadings, but the admission is accompanied with such statements as to the assignment of the partnership property, and transfer of individual property of Withers for the payment of the indebtedness, and the disposition and use of such property, as to render it a matter of doubt whether, upon an accounting, any amount would remain due to the complainant. The existence of any present indebtedness is denied, and the case was brought to a hearing on the pleadings without any evidence.†

Is the claim of the complainant against Withers established by the decree of the Circuit Court of Virginia so as to authorize the present bill? The suit in this latter court was brought against all the partners, but personal service was made only upon two of them, Withers and Selden, and the case proceeded against the others upon publication of citation. Withers, as already stated, insisted in his answer, among other things, upon the merger of the causes of action in the New York judgment; and that his individual prop-

* D'Arcy v. Ketchum, 11 Howard, 174; Bates v. Delavan, 5 Paige, 305; Story on Conflict of Laws, § 546.

† Young v. Grundy, 6 Cranch, 51.

erty conveyed to trustees could not be subjected to sale until the trusts in the deed of assignment were executed; but the Circuit Court, without appearing to attach any weight to this defence, immediately rendered its decree against all the partners. Withers desired to appeal from this decree, but the Court of Appeals denied his application for that purpose, on the ground that the decree was merely interlocutory and not final, declaring, in its order, that it deemed it "most proper that the case should be proceeded in further" before an appeal was allowed. One of the principal objects of the suit was to obtain a sale of the property conveyed by him to trustees, and the application of the proceeds to the debt of the firm of Selden, Withers & Co. to the complainant. The amount of individual property thus conveyed exceeded in nominal value, as already stated, $250,000, and this was to be applied only to cover a deficiency remaining after the application to that debt of a portion of the partnership assets assigned in 1854. The Court of Appeals may have considered that the decree of the Circuit Court, as a personal judgment, was not to be treated as final, but only as interlocutory, until the deficiency mentioned was determined, and the property held as security for its payment had been sold and applied. At any rate, the complainant, relying upon the decree of the court as evidence of his demand against Withers, invoking for it full faith and credit under the clause of the Constitution, cannot object to the character which the highest court of Virginia has given to it, or insist that it is entitled to any other consideration or weight. No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on that subject.*

If the decree was interlocutory, it is to be treated as only fixing provisionally the indebtedness to the complainant of the firm of Selden, Withers & Co., and, of course, the indi-

* Suydam v. Barber, 18 New York, 468.

vidual liability of Withers. The adjudication did not prevent a re-examination of the question of his liability, if an examination of the merits of his defence were ever made, or any subsequent modification of the terms of the interlocutory decree. The whole subject remained open, under the control of the court, and at the final hearing the provisions of the decree might have been enlarged or restricted, or otherwise modified.

It does not appear from the bill, or the record annexed, whether any proceedings for the enforcement of the interlocutory decree were subsequently taken; whether the property in Virginia or in Missouri, or any part of such property, was ever sold; or, if a sale was made, whether any of the proceeds were applied to the extinguishment of the amount adjudged due. If any inference upon this head can be drawn from the allegation of the bill that the amount remains wholly unsatisfied, it is that no such proceedings were ever taken.

The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed and there must exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property. Unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. In all cases, we believe property pledged or conveyed for the payment of the debt must be first applied.

The rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction, should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, assets of a deceased debtor, which have already been subjected to administration and distribution; but some satisfactory excuse should be given for the failure of the cred-

itor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution.*

In England, courts of chancery took jurisdiction of bills against executors and administrators, for discovery and account of assets, and to reach property applicable to the payment of the debts of deceased persons, not merely from their general authority over trustees and trusts, but from the imperfect and defective power of the ecclesiastical courts. It was sufficient that a debt existed against the estate of a decedent, and that there was property which should be applied to its payment, to justify the interposition of the court; but when a distribution of the fund had been made, another creditor could not ask for a return of the moneys from the distributees or for a proportional part, if he had received notice of the original proceeding, and had been guilty of laches or unreasonable neglect.†

In this country, there are special courts established in all the States, having jurisdiction over estates of deceased persons, called probate courts, orphans' courts, or surrogate courts, possessing, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment and the distribution of the property to legatees or other parties entitled, and generally to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against his estate. There is a special court of this kind in this District, called the Orphans' Court, which was competent to allow the complainants' demand, but the demand was never presented to it for allowance. That court could have directed the application of the assets of the estate, if the demand had been allowed, or, if rejected, had been established by legal proceedings. No application was made for its aid, nor was the demand brought to the attention of the Supreme Court of the District when the

* Williams v. Gibbes, 17 Howard, 239, 254, 255; Pharis v. Leachman, 20 Alabama, 662.

† Sawyer v. Birchmore, 1 Keen, 391.

estate was before it for settlement, although publication was made by the auditor for the presentation of claims. No explanation is made or attempted of this neglect, and the only grounds disclosed by the bill for relief are fully met by the answers, and are not sustained by any proof.

We are of opinion, for the reasons stated, that the decree of the court below, dismissing the bill, was correct; and it is unnecessary to consider the objections to it founded upon the non-joinder of the surviving partners of Withers, and the statute of limitations.

DECREE AFFIRMED.

REA v. MISSOURI.

1. Although a greater latitude is allowable in the cross-examination of a party who places himself on the stand, than in that of other witnesses, still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error.
2. Where A. had levied on certain goods as owned by B., which C. claimed, the allegation of A. being that there had been collusion between B. and C., and that C. was a mere instrument of B., *held* on a suit by C. against A. for damages—(the jury having been charged by the circuit judge in a way not excepted to, and coming in for additional instructions and being again charged by the district judge, who now happened to be on the bench)—

   1st. That where the manifest tendency of the additional instructions, contrary to that of the original charge, was to give the jury the impression that evidence was required of a character more direct and positive than that of facts and circumstances tending to the conclusion of fraud, and such as might reasonably induce the jury to believe that C. held the property but in trust for B., the additional instructions were erroneous. And further, that it would not be inferred by this court that the jury had taken them in connection with the qualifications made in the original charge.

   2d. That any statements made by B. in the absence of C., which were afterwards assented to by the latter or were part of the *res gestæ*, were evidence in the suit.

Statement of the case.

3d. That an intimate personal and business relation between B. and C. having been shown, it was error to instruct the jury that it was immaterial as to the ownership of the goods how C. acquired his means, or whether his exhibit of them was correct or not.

ERROR to the Circuit Court for the District of Missouri; the case being thus:

The First National Bank of Washington, D. C., in 1869, having a judgment against one Perry Fuller, who had been a large dealer with the Indians on the Western frontier, having more than one trading-place there, levied on certain goods at St. Louis, in Missouri, which they alleged to be his. One Hayes, however, claimed them; and the sheriff refusing to go on with his levy unless indemnified, the bank, along with Rea and another, in accordance with a statute of Missouri, executed a bond to the State of Missouri, conditioned that the bank should indemnify the sheriff against the seizure of the goods, and should also pay Hayes, and any person claiming title to the property, for all damages which they should sustain in consequence of such seizure and sale.

The sheriff hereupon sold the goods under the attachment, and thereupon an action was brought in the name of the State of Missouri on the relation and to the use of Hayes against the sureties in the bond, Rea, and the other; the suit, of course, being in fact, one by Hayes, for an illegal seizure and sale of his goods.

The bank set up that the goods belonged to Fuller, and that the purchase of them by Hayes was a simulated and fraudulent one, and was in truth made for the benefit of Fuller.

The great question on the trial was whether there was or was not a fraudulent scheme between the two persons, by which the goods in question were to be purchased in Hayes's name, but in secret trust for the use and benefit of Fuller, wholly or in part.

In the course of the trial Hayes, the virtual plaintiff, was placed on the stand, by his own counsel, to show the value

of the goods in question, and the fact that he had purchased them on his own account alone. His cross-examination was very long, covering fifty pages of the printed record, and took a wide range. It appeared on this cross-examination that in 1865 he had been a clerk in the Indian Department at a salary of $1500, and had a wife and child, and that these goods were bought in 1869, and had cost about $24,000, being bought partly for cash *and partly on credit.* To explain his ability to make a purchase, in either way, on so considerable a scale, the witness having stated that in 1865—some four years before the goods were bought—he was worth $45,000, he was asked how he had acquired that sum. As to a portion of it he stated that he had advanced money,—sometimes $3000 or $4000, and from that to $6500 at a time,—to a third person to buy up government vouchers on speculation; and that he and this person had shared, share and share alike in the profit.

The record then disclosed the following dialogue:

Counsel for the defendants (to the witness):

Question. To whom did you lend this money to buy Indian vouchers?

Answer. To a friend of mine.

Question. Who was it?

Answer. If the court requires I shall tell the name, not without.

Question. You decline to answer?

Answer. If the court requires it, I will answer.

The Court. If there is some reason why he does not wish to disclose the name, the court will not oblige him to do it.

Counsel for the defendants. The witness might answer the questions; they are very short.

The Court. He may have personal reasons why he does not choose to name the parties; if so, I won't press him.

Counsel for the plaintiff. Suppose the man was an officer of the government, and made himself criminally liable?

Counsel for the defendants. Then let the witness state it.

The Court. If there are personal reasons why the witness does not choose to answer, he need not state it.

Witness. I prefer not to give it.

And thereupon, no answer being given, an exception was noted.

Hayes also stated in his cross-examination, that Fuller & Co. and McDonald & Fuller, firms dealing with the Indians, and in which Perry Fuller was interested, were indebted to him for services rendered to them in certain contracts which they had with the government in 1866, and that they had paid him large amounts on that account, a matter which the defendants denied to be true.

The goods had been purchased at New York by Hayes, and the bills made and the goods shipped to St. Louis in his name alone.

A great mass of evidence of a circumstantial character was taken on the subject, showing the history and character of the connection between Hayes and Fuller; and as the defendants contended, tending to prove that Hayes was a mere tool of Fuller's, in this as well as other transactions. It was shown that Hayes had been in intimate relations with Fuller previously to this purchase; that Fuller, though a dealer with the Indians, and in the West, was much in Washington, and that Hayes, as already said, was a clerk in the Indian Department in that city, and that the two persons were acquainted in this manner in 1861; that Fuller being afterwards, 1868, appointed revenue collector at New Orleans, Hayes was appointed an appraiser under him, with a salary of $1800; that in the matter of the purchase of the goods levied on, Fuller recommended Hayes as a purchaser of them, certified to his responsibility, indorsed his notes for a part of the purchase-money, and pledged his wife's securities as collateral to a portion thereof. A great variety of other evidence of many kinds was given tending, as the counsel of the defendants conceived, to show intimacy and collusion. Amongst this evidence were various declarations of both Hayes and Fuller, made at different times, as well when they were together as when they were not.

The testimony being closed the circuit judge charged the jury thus:

"If you find from the evidence that Hayes was the sole

owner of the goods, and that Fuller had no interest or right of property therein, then the bank had no right to levy its attachment upon them, and the defendants are liable to the plaintiffs for their damages.

"But if you find that Fuller owned the property attached, or was a copartner, though a secret copartner with Hayes in respect to said goods, or had a joint interest in them, then, in either case, the bank had a right to attach the goods, and the defendants are not liable in this action; and in this action are not liable although Hayes, as between himself and Fuller, may have had a joint interest, with Fuller, in the goods."

After stating that the goods were purchased in New York in the name of Hayes, and that the bills were made to him, and that *primâ facie*, therefore, the goods would be Hayes's, the learned judge added:

"But the bank asserts that, although the goods were thus purchased ostensibly or apparently in the name of Hayes, yet that the purchase was in pursuance of a secret agreement or understanding between Hayes and Fuller, to the effect that Hayes should buy, in his own name, but for Fuller's benefit and use, or for the joint use and benefit of Hayes and Fuller, and that the motive or inducement for this arrangement or understanding was that Fuller was in embarrassed circumstances, or was apprehensive of trouble if his name was known in the purchase. In other words, the bank alleges that there was a fraudulent scheme between Fuller and Hayes, by which goods were to be purchased in Hayes's name, but in secret trust for the use and benefit of Fuller wholly or in part."

The learned judge then told the jury that the alleged fraudulent scheme might be established by circumstances; that it was not necessary to establish it by express or positive testimony; and after other pertinent remarks, not now material to be stated, the case was submitted.

The jury having remained out until the next morning failed to agree, and returned into court, when they were again charged by the district judge, then holding a Circuit Court, as follows:

["If the property in question was bought and shipped solely

in the name of Hayes, then the jury should find the ownership to be exclusively his, unless the defendants have proved that notwithstanding such purchase and shipment, the fact really is that the ostensible and apparent ownership of Hayes was to cover up and conceal a *proprietary* interest of Fuller in the goods. In other words, the possession of the goods by Hayes, the same having been bought and shipped solely in his name, throws upon the defendants the burden of proving that Fuller had a *property* interest therein, or was part owner thereof.]

["The defendants, in proving a secret or other agreement or understanding between Hayes and Fuller *as to ownership of these goods*, must first establish that fact by competent evidence, independent of any declarations or statements by Fuller in the absence of Hayes.]

["In order to prove such understanding, the defendants cannot resort to such declarations or statements by Fuller; hence, discarding from your minds on that branch of the inquiry all statements made by Fuller in the absence of Hayes, you should first determine whether such an understanding existed. If it did not exist, or is not proved by testimony independent of such statements by Fuller, then the jury cannot consider such statements by Fuller as any evidence whatever in this case. If satisfied by such independent evidence that such an understanding existed, then Fuller's declarations are competent testimony, and not otherwise.]

["It is immaterial as to the *ownership of the goods* how Hayes acquired his means, or whether his exhibit of his means was correct or not, if he actually bought the goods solely for himself. The merchants of whom he bought, if the purchase was based on false representations, had their legal redress, but the defendants cannot impair the title on such grounds;] that testimony it is proper for the jury to consider in reference to the credibility of Hayes as a witness, and also as tending to show what connection, if any, Hayes had at the time with Fuller, and so with respect to the manner in which he acquired his means or credit.

["If he wronged the government, or violated his official obligations, or procured an unfair advantage in his settlement with Fuller & Co. or McDonald & Fuller, this is not the case in which he is to be tried for such alleged misconduct. This is a simple question *as to the ownership of the goods in controversy*, and not as

to other or outside questions, and such questions have nothing to do with the merits of this case further than they affect the credibility of witnesses, or throw light upon the alleged understanding between Hayes and Fuller *as to their ownership of this property.*"]

After this last charge the jury brought in a verdict of $23,127; and judgment being entered accordingly, the defendant brought the case here on an exception to the ruling as to Hayes's refusal to answer, and on exceptions to different parts, put above in brackets, including, in all, almost every part of the charge as last above given. No exception was taken to the charge of the circuit judge; on the contrary, it was admitted to be proper.

Messrs. J. B. Henderson and A. F. Smith, for the plaintiff in error:

1. *As to the refusal of the court to make Hayes name the third person, styled his friend; the exception to the ruling of the court on the admission of evidence.*

Whether or not Hayes did own $40,000 when he bought these goods was a question of capital importance in the case. If he did, HE might well have bought them. If he did not, and owned nothing, HE could not have bought them at all; and this, his inability to buy them, taken in connection with the intimate relation, both generally and in this particular transaction, shown with Fuller, made patent the collusion and fraud which was set up and charged by the bank, and which was the *gist* of the case. The matter which it was sought by the question to prove went, therefore, directly to the foundation of the case. There was nothing irrelevant or even collateral in it.

Moreover, the question put was one invited, by what the witness himself had shown, to wit, that he had been but an inferior clerk—one at $1500 a year—and had a wife and child with himself to provide for. How then did he, during that time, come to get $40,000?

Our purpose in the question was obvious. We wished Hayes to name his alleged friend, that we might call that

"friend" and show by him that Hayes's statement was false, and that Hayes had never made anything in the way alleged. The witness, it will be observed, did not set up as a ground for his refusal that a disclosure of his alleged friend's name would criminate either the friend or himself. He simply declined to name him; and the court sustained the witness.

Now, while it is no doubt true, that when a witness is under cross-examination and the object of counsel is merely to test his accuracy, or his memory, or to impeach him by an exposure of his transactions outside of the case on trial, the whole control of the cross-examination rests with the judge who presides, and that the judge may either restrict the counsel or may throw the door wide open—the only limits being that the witness shall not be required to give evidence tending to prove himself guilty of a crime, and that he shall not be required to expose himself to a penalty or forfeiture—yet when the evidence in question is principal evidence, and is not collateral or irrelevant to the issue, the witness will not be excused from answering. And this is true even if it appear that the answer will tend to degrade him;* a matter which, as we have said, was not here alleged.

Further. A witness having voluntarily and without objection testified to part of a transaction in such a manner as favorably to affect the case of one side, cannot afterwards object to tell the remainder of the story, when such remainder might afford an explanation or an answer to the part already told. And this is again true, even though telling the remainder will tend to convict the witness of a crime.†

* 1 Greenleaf on Evidence, § 454; 2 Phillips on Evidence, 939 (ed. of 1859), also note 593; Swift on Evidence, 80, 81; The People v. Abbot, 19 Wendell, 192-195; Great Western Turnpike Company v. Loomis, 32 New York, 127, 137; The People v. Lohman, 2 Barbour, 224-5; Lohman v. The People, 1 Comstock, 379-385; In re Lewis, 39 Howard's Practice Reports, 155; Hill v. State, 4 Indiana, 112; Weldon v. Burch, 12 Illinois, 374; Clementine v. State, 14 Missouri, 112; State v. Douglass, 1 Id. 527; Ward v. State, 2 Id. 120; Ginn v. The Commonwealth, 5 Littell, 300; Clark v. Reese, 35 California, 89.

† Roberts v. Garen, 1 Scammon, 396; Pitcher v. The People, 16 Michigan,

Argument for the defendant in error.

2. *As to the additional instructions:* While the first charge properly left to the jury the real question in the case—namely, whether the goods bought by Hayes in his own name were bought upon some secret trust for the benefit of Fuller—the additional instructions, or new charge, as it really was and might be better called, was calculated to lead the jury to throw out of account every consideration but the one, who bought the goods, and to give no weight to the facts, which tended to prove that there was a secret trust for Fuller.

The additional instructions or new charge, moreover, gave an unusual and a prejudicial prominence to the consideration that if Hayes wronged the government, or violated his official obligations, or procured an unfair advantage in his settlement with Fuller & Co., or McDonald & Fuller, this was not the case in which he was to be tried for such alleged misconduct, especially when the judge added, "This is a simple question as to the *ownership of the goods in controversy*, and not as to other or outside questions."

This was almost like directing a verdict for the plaintiffs.

Besides this, the additional instructions or new charge left out of view the consideration that the jury should consider the fact whether Hayes had the means to buy these goods and undertake this business, and that if he had not, the jury might properly infer that the business was Fuller's, and that Hayes was his secret agent.

The effect of the additional instructions or new charge, as a whole, was to obliterate what the circuit judge had said in the first charge.

Mr. J. O. Broadhead, contra:

1. *As to the refusal of the court to make Hayes disclose the name of the third person, referred to as his friend; the exception to the ruling of the court on the evidence.*

142; Woburn *v.* Henshaw, 101 Massachusetts, 198; Crittenden *v.* Strother, 2 Cranch's Circuit Court, 464; Chamberlain *v.* Wilson, 12 Vermont, 491; State *v.* K——, 4 New Hampshire, 562; Foster *v.* Pierce, 11 Cushing, 437; Commonwealth *v.* Price, 10 Gray, 472, 476; McGarry *v.* The People, 2 Lansing, 227; Low *v.* Mitchell, 18 Maine, 374; Coburn *v.* Odell, 10 Foster, 540.

Argument for the defendant in error.

The examination in chief has no reference to this subject. Could not the other side, if desiring testimony *de novo*, have called the witness?*

But, under any circumstances, can a witness be compelled to state a fact in order that the other side may contradict him? Moreover, an answer, if one had been given—and even if the information given by it had been followed out—that is to say, if the friend had been named, and even if that friend had said that he had never had any transactions with Hayes —would not have been relevant to the matter in issue:

1st. Because all transactions alleged with the friend were in 1866, more than three years before the purchase of these goods.

2d. Because the witness did not say that he had paid cash for the goods. On the contrary, it is part of the case that he did not pay cash for them, but that he bought them largely on credit. A man who buys largely on credit rarely has cash. Here the goods cost but about $24,000, and even that sum was not paid in cash. Nor indeed does it appear whether it has ever yet been paid at all.

Moreover, the matter whether the witness should answer rested with the judge. He did give a vast latitude to the cross-examination. He had a right to say where it should stop.†

2. *As to the additional instructions:* These were but supplementory to the charge, which is admitted by the opposite side to have been right, and which still remained the principal and fundamental exposition of principles applicable to the case, and must have been so regarded by the jury.

The whole of the new instructions, when analyzed and abbreviated, is this:

1st. That if Hayes bought and shipped the goods in his own name, then *primâ facie* they are his, and the burden of proving a property interest in Fuller is on the defendants.

2d. That the alleged secret understanding between Hayes

* The Philadelphia and Trenton Railroad *v.* Stimpson, 14 Peters, 461.
† Ib. 463.

and Fuller, as to the ownership of the goods, cannot be established by the declarations of Fuller, made in the absence of Hayes, but that such declarations are competent against Hayes after the secret understanding is established by other testimony to the satisfaction of the jury.

3d. That the testimony as to how Hayes acquired his means, whether his exhibit to the merchants of his means was correct or not, whether he took an unfair advantage in his settlements with Fuller & Co., or McDonald & Fuller, is immaterial as to the ownership of the goods, but competent and proper to be considered by the jury as affecting the credibility of Hayes, and as tending to show what connection there was between Hayes and Fuller at the time of the transactions to which this testimony is directed.

What is there in any one of these charges that does not embrace a correct proposition of law?

Mr. Justice BRADLEY delivered the opinion of the court.

1. *As to the exception to the ruling of the court on the admission of evidence in the case.* The cross-examination of Hayes was very long, and took a wide range: much wider than is allowed in United States courts in the case of an ordinary witness, where the cross-examination is usually confined within the scope of the direct examination.* But a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. That was precisely the case here. The witness, on his cross-examination, having stated that he was worth $45,000 at a period some four years prior to the purchase of the goods, was asked how he had acquired that

* Johnston v. Jones et al., 1 Black, 216; Teese et al. v. Huntingdon et al., 23 Howard, 2.

sum. As to a portion of it he stated that he had advanced money to a friend to buy up government vouchers on speculation upon shares. Being asked to name this friend, he declined; and the court refused to compel him to disclose it. This refusal was excepted to. We think it was entirely in the discretion of the court to compel an answer or not. It was on a new matter first introduced on the cross-examination, and was in fact a cross-examination upon a cross-examination. If a court did not possess discretionary power to control such a course of examination, trials might be rendered interminable.

2. *As to the exception to the additional instructions of the court.* This presents a more serious question; and an examination of them leads us to the conviction that, taken as a whole, they were calculated to mislead the jury as to the character of the evidence necessary to make out the charge of fraud and to prove the issue on the part of the defendants.

To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced. It was not necessary in this case, for the defendants, in order to maintain the issue on their part, to prove by direct and positive evidence, that Fuller had a secret trust or property in the goods. It was sufficient if they proved such facts and circumstances tending to that conclusion as might reasonably induce the jury to believe that he had such trust or property. The sufficiency of such circumstantial evidence was not, in our judgment, properly presented to the jury; but, on the contrary, the manifest tendency of the charge was to give them the impression that evidence of a more positive and direct character was required. The court said: "The possession of the goods by Hayes, the same having been bought and shipped solely in his name, throws upon the defendant the burden of proving that Fuller had a property interest therein, or was part owner thereof." Whilst this may have been strictly true in a sense in which it might be understood by an educated lawyer, it did not express the whole truth in a form likely

to be understood by the jury in such a complicated case as the one before them. "Property interest" and "ownership" are words of precise legal signification, and the jury might readily conclude that an interest or trust in the goods, by which Fuller was to receive or to participate in the profits, was not such property or ownership. And yet such an interest or trust would have been sufficient to sustain the charge made by the defendants, and to entitle them to a verdict.

The passage quoted is but one of several expressions contained in the charge, all tending to give the impression that a technical ownership or property in Fuller was necessary to be proved, in order to sustain the validity of the seizure of the goods under the attachment. A further specification is unnecessary.

It may be urged that the qualifications made in the original charge given to the jury before they were sent out, rendered further qualification unnecessary in the final charge now under consideration. On the contrary, it is a more just inference to suppose that the final charge was regarded by the jury as explanatory and corrective of the first. And as the point on which they were likely to have had difficulty and difference of opinion, would be the sufficiency of the circumstances proved, to make out the case of the defendants, a charge like that which was finally given, coming after their fruitless discussion, ignoring altogether the force of circumstantial evidence, and reiterating that the only issue was property or no property in Fuller, must have had a strong tendency to lead them to an entire disregard of such evidence.

We also think the judge erred in laying it down so absolutely as he did, that the defendants in proving a secret or other agreement or understanding between Hayes and Fuller as to the ownership of the goods, must first establish that fact independent of any declarations or statements by Fuller in the absence of Hayes. Any statements made by Fuller in the absence of Hayes, which were afterwards assented to by the latter, or which were a part of the *res gestæ* of the

purchase of the goods, were competent evidence. For example, the statement of Fuller when commending Hayes to the vendors of the goods, that he was worth forty or fifty thousand dollars, if shown to be untrue, was very material evidence.

We also think the judge erred in instructing the jury that it was immaterial as to the ownership of the goods, how Hayes acquired his means, or whether his exhibit of his means was correct or not. Considering the connection between Hayes and Fuller, the fact that Fuller recommended Hayes as a purchaser of the goods, certified to his responsibility, indorsed his notes for a part of the purchase-money, and pledged his wife's securities as collateral to a portion thereof, an inquiry into Hayes's means at the time of the purchase, and the correctness of his exhibit, was competent and proper. The opposite idea proceeded from the view of the case before noticed, to wit, that the only legitimate inquiry was, as to the naked property of the goods. Whereas, the case really turned upon the ancillary question, whether Hayes and Fuller were engaged in a fraudulent scheme to procure goods in the name of Hayes, but for the secret benefit of Fuller.

JUDGMENT REVERSED, and a

VENIRE DE NOVO ORDERED.

Mr. Justice CLIFFORD dissented, on the first point, the exception to the ruling of the court on the admission of evidence.

ELDRED v. BANK.

1. The court adheres to the doctrine that a judgment on a note or contract merges the note or contract, and that no other suit can be maintained on the same instrument.
2. Such a judgment, when binding personally, can be introduced in evidence and relied on as a bar to a second suit on the note.

Statement of the case.

3. When a defendant has filed a plea to the merits, and afterwards, by leave of the court, withdraws his plea, that does not withdraw his appearance, and he is still in court so as to be bound personally by a judgment rendered against him in the action.
4. Special circumstances of an alleged misleading of the court and opposite counsel by a statement of counsel, considered as a reason for refusing to reverse a judgment manifestly erroneous, and found to be insufficient.
5. But though the judgment is reversed and there does not appear to have been any intent to deceive, the plaintiff in error, under the circumstances, recovers no costs in this court.

ERROR to the Circuit Court for the Eastern District of Wisconsin; the case being thus:

A statute of Michigan known as the Joint Debtor Act* thus enacts:

"1. In actions against two or more persons, jointly indebted upon any joint obligation, contract, or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff; and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process.

"2. Such judgment shall be conclusive evidence of the liability of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

This statute being in force, the Michigan Insurance Bank, on the 14th of August, 1861, sued Anson Eldred, Elisha Eldred, and Uri Balcom, trading as Eldreds & Balcom, in the court of Wayne County, Michigan, as indorsers on a promissory note for $4000. On the same day a writ of attachment was issued, and the sheriff returned to it that he had attached certain property, but that he was unable to find any of the defendants in his bailiwick. Publication-notice under the laws of Michigan was given, and thereupon the defendants' appearances were entered in the Common Rule Book by the attorney of the plaintiff, under the practice of Michigan, and

* Compiled Laws of Michigan of 1857, vol. 2, chap. 138, page 1219.

a declaration, to which a copy of the note sued on was annexed, filed December the 16th, 1861. The defendant, *Anson* Eldred, filed a plea of non-assumpsit, with notice of set-off, December 27th, 1861, and demanded a trial.

On the 22d of April, 1862, as the record of the case stated, the cause came on to be heard, and the plea of the defendants theretofore pleaded by them was withdrawn, and the default of *Elisha* Eldred and Uri Balcom entered, and on the 10th day of May the said default was made absolute. On the 13th of May, the record continues:

"The plea of the defendant, *Anson* Eldred, heretofore pleaded by him, having been withdrawn, and the default of the defendants, Elisha Eldred and Uri Balcom, having been duly entered, and the same having become absolute, and the damages of the said plaintiff, on occasion of the premises, having been duly assessed at the sum of $4211 over and above their costs and charges by them about their suit in this behalf expended; therefore, it is considered that said plaintiffs do recover against said defendants their damages aforesaid, together with their costs aforesaid to be taxed, and that said plaintiff have execution therefor."

In this state of things the bank brought this, the present suit, in the court below, on the same note against the same Anson Eldred, Elisha Eldred, and Uri Balcom. The declaration contained a special count on the note against the Eldreds and Balcom, as indorsers, and the common counts with a copy of the note annexed and notice that it would be given in evidence under them. *Anson* Eldred, who alone was served or appeared, pleaded the general issue; and the case came on for trial. The plaintiffs having offered the note sued upon, and proof tending to show presentment of it for payment, dishonor, and notice to the indorsers, and having rested their case, the defendant, who had given some proof tending to show a fraudulent alteration in the note, then offered in evidence the record of the above-mentioned suit on the same note in the Wayne County Court:

1st. As corroborative proof that the note was fraudulently made.

2d. As being a *bar* to recovery on this note in suit.

The plaintiffs' counsel objected to the records being received.

The bill of exceptions proceeded:

"The defendant's counsel, in answer to a question from either the court or counsel, admitted that the said suit was an *attachment suit, and that there was no personal service of process on the defendant.*"

The court after this overruled the plaintiff's objection and admitted the record in evidence. And, in charging the jury, refused to charge them—as the defendant asked that they should be charged—that the judgment was a bar to the action on the note now sued on.

Judgment having gone accordingly for the bank, Anson Eldred brought the case here on error; the error assigned being the refusal of the court to instruct the jury that the judgment was a bar.

In the case of *Mason* v. *Eldred*,* this court announced its adherence to the general doctrine that when a judgment was recovered on a promissory note in a court of competent jurisdiction the original cause of action was merged in the judgment, and such a judgment was a bar to any future action on the note; but said that by the statute law of Michigan this effect was not given to the judgment as to parties to the note who were not served in the first suit nor had personally appeared.

In the case now before the court the question was whether, by the record of the suit in the Wayne County Court, Anson Eldred was before that court, in Michigan, when the judgment was rendered against all the defendants, so as to bind him personally as if he had been served with notice.

Mr. J. P. C. Cottrill (*a brief of Mr. J. W. Cary being filed*), *for the plaintiff in error:*

1. The appearance of Anson Eldred in the suit in the

* 6 Wallace, 231.

Argument for the defendant in error.

Wayne County Court, and his pleading to the merits, was equivalent to personal service of process, and gave to the Michigan court full jurisdiction of his person (which was all that was necessary to be acquired in order to render a valid judgment), as also of his cause. His subsequent withdrawal of his plea could not divest the court of the full jurisdiction that it had previously acquired.*

2. The judgment afterwards obtained was admissible in evidence under the plea of the general issue, and was a bar to this, it being another suit on the same note there sued and recovered upon.†

Mr. A. Finch, contra:

1. The only appearance entered by the defendant, in the Wayne County suit, was by the filing of a plea. The court, upon motion of the defendant's attorneys, permits the plea to be withdrawn. Is not that the same, in legal effect, as if the order had been that the defendant have leave to withdraw his appearance? There is no doubt that a court in which an action is pending has the right to permit a party to withdraw his appearance, and if the withdrawal is allowed, the order must be held conclusive until vacated or set aside by a proper proceeding. It cannot be reviewed in another and different action, in another court.

In *Forbes* v. *Hyde*,‡ it appeared that an answer was inadvertently filed for all the defendants in the suit. The attorneys upon discovering the mistake made application to the court to withdraw *the answer* and file another, limiting their appearance to the defendants whom they represented and for whom they intended to answer. The motion was granted. In another action the record was offered in evidence. It was

* Pollard & Pickett v. Dwight, 4 Cranch, 421; Farrar & Brown v. United States, 3 Peters, 459; Toland v Sprague, 12 Id. 331; Shields v. Thomas, 18 Howard, 253; Jones v. Andrews, 10 Wallace, 327.

† Mason v. Eldred, 6 Wallace, 231.

‡ 31 California, 346; and see Dubois v. Glaub, 52 Pennsylvania State, 242; Lodge v. The State Bank, 6 Blackford, 558; Michew v. McCoy, 3 Watts & Sergeant, 502.

objected to on the ground that it appeared the court had never acquired jurisdiction of the person. The objection was overruled, and the record was admitted in evidence in the lower court. On error, it was held improperly admitted. The opinion says, as to the *effect of the withdrawal of the answer:*

"Upon the discovery of the mistake, upon application, and a proper showing promptly made to the court, and by order of the court, the mistake was corrected and the answer, and *consequently the appearance involved in the filing, were withdrawn.* After the correction of this mistake, *the record, in legal contemplation, stood as though it had never occurred, and there can be no reasonable ground for holding that the court, after the answer was thus withdrawn, had jurisdiction, in consequence of the inadvertence. The plaintiff was in no way injured.* The way was open to him to proceed in the proper mode, as he had before commenced to do, to obtain jurisdiction, and he did proceed, in all respects, as though no answer had been filed."

2. The statement of the counsel of the defendant at the time when he offered the copy of the record in evidence—and when the court made an inquiry of him whose obvious and sole purpose was to obtain a true and full knowledge of the nature of the record thus offered by him—that it was "*a suit commenced by an attachment, and that there was no personal service of process,*" was a representation of such a character, and made under such circumstances, that to allow the defendant now to allege that the said record shows an appearance duly entered in the suit by the defendant, would be to impute a fraud by the learned counsel of the defendant upon the court below. It would be, in effect, permitting the defendant to allege, as a ground of reversal, a fact which he must have known was in the record when he offered it, and which fact he must have intentionally suppressed.

The defendant ought not to complain if the presiding judge assumed the record to be what his counsel represented it to be. His statement, indeed, could have left no other impression upon the judge than that it was a record affecting only

the property attached, and not creating any personal liability on Anson Eldred or in any way binding on him. It is certain that the presiding judge, and the counsel for the plaintiff, were led by the statement of the counsel to believe that this was the fact. Now, the rule of law is well settled that solemn admissions made by counsel in the progress of a trial conclude the party making them.*

Mr. Justice MILLER delivered the opinion of the court.

It is argued by the counsel of the defendant in error that the withdrawal of the plea of Anson Eldred left the case as to him as though he had never filed the plea, and that never having been served with process he was not liable to the personal judgment of the court.

We do not agree to this proposition. The filing of the plea was both an appearance and a defence. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. Having withdrawn that plea he was in condition to demur, to move to dismiss the suit if any reason for that could be found, or to file a new and different plea if he chose, either with the other defendants jointly, or for himself. He was not, by the withdrawal of the plea, out of court. Such a doctrine would be very mischievous in cases where, as it is very often, the first and only evidence of the appearance of a party is the filing of his plea, answer, or demurrer. The case might rest on this for a long period before it was ready for trial, when, if the party could obtain leave of the court to withdraw his plea (a leave generally granted without objection), he could thereby withdraw his appearance, the plaintiff is left to begin *de novo*.

* Vandervoort v. Smith, 2 Caines, 164; Hoyt v. Gelston, 13 Johnson, 141; Fernald v. Ladd, 4 New Hampshire, 370; Morrish v. Murray, 13 Meeson & Welsby, 52; Shutte v. Thompson, 15 Wallace, 151.

We are of opinion that the record of the suit in Michigan shows a valid personal judgment against Anson Eldred, and that that judgment was a bar to recovery in the present suit.

But it is further urged that the present judgment should not be reversed because the court was prevented from giving the instructions asked by defendant's counsel by being misled by that counsel as to the character of the judgment. The bill of exceptions, immediately after what is said about the purposes for which the transcript of the judgment was offered, proceeds as follows: "The defendant's counsel, in answer to a question from either the court or counsel, admitted that said suit was an attachment suit, and that there was no personal service of process on defendant."

It is argued that this was equivalent to a declaration that it was rendered without notice or personal appearance. This impression may have been produced on the opposite counsel and the court may have shared in it. But it is very clear that it was not so equivalent, and that what he said was perfectly consistent with what is now found to be in that transcript, namely, the appearance of defendant and a valid personal judgment against him. Many attachment suits are accompanied by the appearance of defendant in the progress of the suit, though not served with process or notice.

Besides, the counsel for defendant had stated that he offered it as a bar, and both counsel and court had their attention turned to the fact that it could be no bar without service or appearance; and after all this was over and the record admitted he asked the court for the instruction which was refused and which could only be founded on the idea that it was valid as a personal judgment. The record was open to inspection of counsel opposed, and it would be a very dangerous practice to hold, under these circumstances, that counsel had intentionally misled his opponent and the court in this matter.

There seems to be an entire absence of motive to deceive the court or counsel. What was said was at the time the

record was offered in evidence as a bar. To show that it was a valid personal judgment was to secure its admission, while to show it was not was to render its admission doubtful.

So, in regard to the instruction, there could be no object in misleading the court other than to have a judgment rendered against his client that he might have the satisfaction of reversing it, a motive hardly to be imputed to counsel in this court. It seems much more reasonable to infer that counsel doubted whether the withdrawal of the plea did not withdraw the appearance of defendant, and, therefore, did not say anything on that point.

We do not think that under these circumstances we can permit a judgment to stand, manifestly erroneous, where there is a complete bar found to it in the record, when the effect would be to close to defendant entirely this defence, while to reverse it would only leave the other party where he would be had nothing been said.

He has not been injured by the statement of the opposing counsel. Shall he profit by it to the extent of having an erroneous judgment confirmed?

JUDGMENT REVERSED, but without costs to either party in this court, and a new trial granted in the Circuit Court.

RAILROAD COMPANY v. FORT.

F., a boy of tender years, had been engaged, by a company owning it, in a machine shop, as a workman or helper under the superintendence of C., and required to obey his orders. After being employed for a few months chiefly in receiving and putting away mouldings as they came from a moulding-machine, the boy, by the order of C., ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order had his arm torn from his body. The jury, by a special ver-

dict, found that the order was not within the scope of the boy's duty and employment, but was within that of C.; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it. *Held*, that the company was liable in damages for the injuries, and that the rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury,—whether a true rule or not,—had no application to the case.

ERROR to the Circuit Court for the District of Nebraska.

Fort brought a suit in the court below to recover damages for an injury to his son, aged sixteen years, resulting in the loss of an arm, while in the employment of the Union Pacific Railroad Company. The boy was employed in the machine shop of the company as a workman or helper, under the superintendence and control of one Collett, and had been chiefly engaged in receiving and putting away mouldings as they came from a moulding machine. After the service had been continued for a few months the boy, by the order of Collett, ascended a ladder, resting on a shaft, to a great height from the floor, among dangerous machinery, revolving at the rate of 175 to 200 revolutions per minute, for the purpose of adjusting a belt by which a portion of the machinery was moved, and which had got out of place. While engaged in the endeavor to execute the order his arm was caught in the rapidly revolving machinery and torn from his body. The jury, by a special verdict, found that he had been engaged to serve under Collett as a workman or helper, and was required to obey his orders; that the order by Collett to the boy (in carrying out which he lost his arm) was not within the scope of his duty and employment, but was within that of Collett's; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it.

The circuit judge (DILLON, J.), in charging the jury, after conceding, in accordance with requests of the railroad company, that it was a rule settled, at least by precedent, that

a master is not liable to one of his servants for injuries resulting from the carelessness of a fellow-servant, said:

"In deciding this case you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service or the duties which he engaged to perform were such that it was within the contract or within the scope of those duties that the son should assist in the repair of the machinery in question, and that the son when injured was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett (if he was negligent) with respect to ordering the son to ascend the ladder and hold the belt away from the shaft. [But I draw this distinction; if the work which the son was ordered by Collett to do, was not within the contract of service, was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in the scope and course of his duties and power at the time) must, as to this act, be taken to represent the company (which is presumed to be constructively present); and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle, that the master is not liable for the neglect of a co-employé in the same service, has no application, or no just application to such a case; for in such a case they are not, in my judgment, in any proper sense 'fellow-servants in the same common service.']"

To the part of the instructions included in brackets, the defendants excepted; and the jury having found for the plaintiff, and judgment being entered accordingly, the case was now here on the exception.

Mr. C. P. James (*a brief of Mr. A. J. Poppleton being filed*), *for the plaintiff in error:*

The rule is, in the absence of statutory enactment, settled both in England and in this country, that, with certain exceptions which it was not pretended applied to this case, the master is not liable to his servant for injuries accruing to

Argument for the railroad company.

him by reason of the negligence of a fellow-servant engaged in a common employment.

The court, in instructing the jury, not denying the rule to be settled as above stated, sought to incorporate into it an exception, which is believed to be without any precedent whatever, and in conflict with certain established principles regulating the relation in question.

If the service during which the accident happened was without the scope of the boy's duty and employment, then the boy, when directed by Collett, was at liberty to refuse to obey. In obeying he was in the position of a mere volunteer; in the position of a bystander who should assist at the request of the company's servant. Now a volunteer, assisting at the request of the master's servant, assumes the character of a fellow-servant, and the master is not liable for injury arising from negligence of fellow-servants.* It makes no difference that plaintiff's son was a minor, sixteen years of age.†

It was error to instruct the jury that if the work which the son was ordered by Collett to do, was not within the contract of service, but was outside of it, then Collett, in ordering the service in question (if he was within the scope and course of his duties and powers at the time) must, as to this act, be taken to represent the company (which is presumed to be constructively present).

Collett was clothed with no discretion in hiring, discharging, or assigning to duty. He was a mere superintendent of a particular kind of work and machinery, hired and assigned to his duty as the boy was. He could not, therefore, in any sense, be said to represent the company as constructively present. The case of *Murphy* v. *Smith*‡ decides the question. The defendant there was the proprietor of a match manufactory. One Simlack was superintendent or manager. Under him was Debor, a workman who, in Simlack's absence, managed the establishment. The plaintiff,

* Degg *v.* Midland Railway Co., 40 English Law and Equity Reports, 376.

† King *v.* Boston and Worcester Railroad Co., 9 Cushing, 113.

‡ 19 Common Bench, New Series, 361.

one Murphy, a boy of tender years, had been hired by Simlack, and was set to stir a compound—liable to explosion when not skilfully done—with a stick, and in the presence of Debor, whose duty it was to mix the compound, which exploded.

The court submitted to the jury whether the accident was caused by the negligence of Debor, and whether he was at the time acting as manager of the establishment. The jury answered both questions in the affirmative. The court, in its opinion, says, "that the accident was the result of Debor's negligence, and that he is not shown to have filled any other position in relation to the plaintiff than that of a fellow-workman."

Messrs. J. I. Redick and Clinton Briggs, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries, resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition, as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case.

It is apparent, from the findings in the present suit, if the rule of the master's exemption from liability for the negligent conduct of a coemployé in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employé, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If

it were otherwise principals would be released from all obligations to make reparation to an employé in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employés of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction.

The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract and wholly disconnected with it. To work as a helper at a moulding machine, or a common work-hand on the floor of the shop, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute. The father had the right to presume when he made the contract of service that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being

able to judge for himself he had a right to rely on the judgment of Collett, and, doubtless, entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so. Indeed, it is very difficult to reconcile the conduct of Collett with that of a prudent man, having proper regard to the responsibilities of his own position and the rights of others. It is charitable to suppose that he did not appreciate the danger and acted without due deliberation and caution. For the consequences of this hasty action the company are liable, either upon the maxim of respondeat superior, or upon the obligations arising out of the contract of service. The order of Collett was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not insurers of the lives and limbs of their employés, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. The very able judge who tried the case instructed the jury on the point at issue in conformity with these views, and we see no error in the record.

JUDGMENT AFFIRMED.

Dissenting, Mr. Justice BRADLEY.

[See Packet Company v. McCue, *supra*, p. 508.]

RAILROAD COMPANY v. FULLER.

A State legislature passed in 1862 an act "in relation to the duties of railroad companies," enacting—

1st. That each railroad company should annually, in a month named by the act, fix its rates for the transportation of passengers and of freights of different kinds;

2d. That it should, on the first day of the next month, cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year;

3d. That a failure to fulfil these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of certain penalties prescribed.

Congress, afterwards (in 1866), by an act whose title was "An act to *facilitate* commercial, postal, and military communication between the several States," and which recited that "the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States;" and goes on "*Therefore*, be it enacted," &c., enacted "That every railroad company in the United States, whose road is operated by steam . . . be, and hereby is authorized to carry upon and over its road, boats, bridges, ferries, all passengers, troops, government supplies, mails, freights, and other property on their way from any State to another State, and to *receive compensation therefor*." And enacted further, "That *Congress* may at any time, alter, amend, or repeal this act."

Held, in the case of a railroad running through several States, including that where the State enactment above mentioned had been made, that the State enactment was but a police law, and therefore constitutional.

ERROR to the Circuit Court for the District of Iowa; the case being thus:

A statute of Iowa "in relation to the duties of railroad companies," passed in 1862,* thus enacts:

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers, and freights for transportation of timber, wood, and coal, per ton, cord, or thousand feet, per mile, also, its fare and freight per mile, for transporting merchandise and articles of the first, second, third, and fourth grades of freight.

"And on the 1st day of October following, shall put up at

* Laws of the Ninth General Assembly of the State of Iowa, second section, chapter 169.

all the stations and depots on its road, a printed copy of such fare and freight, and cause a copy to remain posted during the year.

"For wilfully neglecting so to do, or for receiving higher rates of fares or freight than those posted, the company shall forfeit not less than $100, nor more than $200, to any person injured thereby and suing therefor."

On the 15th of June, 1866,* Congress passed an act thus:

"*An Act to facilitate Commercial, Postal, and Military Communication among the several States.*

"Whereas, the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post-roads and to raise and support armies; *therefore*—

"SECTION 1. *Be it enacted*, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to *receive compensation therefor*. . . . Provided, &c.

"SECTION 2. *Be it further enacted*, That Congress may at any time, alter, amend, or repeal this act."

These two enactments, of the State and of the United States, being on the statute-books, the Chicago and Northwestern Railroad Company—a corporation chartered by Illinois and having its principal place of business at Chicago in that State, and working a continuous line of railway from the said Chicago, through Illinois, Iowa, and other States (by the legislatures of which, of course, the different parts of its road were authorized),—having posted their rates of freight and put up a schedule of them in their office, in the station, was transporting, in pursuance of the request of one Fuller, certain goods of his from the said Chicago in Illinois to a place called Marshalltown, in Iowa. Having charged and received from Fuller, as he alleged, a higher

* 14 Stat. at Large, 66.

rate of freight than that posted, Fuller sued them in one of the District Courts of Iowa to recover the penalty which the Iowa enactment purported to give in such a case. The company set up, among other defences, that the said enactment was in violation of that clause of the Constitution* which ordains that—

"Congress shall have power to regulate commerce with foreign nations and among the several States."

The court in which the suit was brought and the Supreme Court of the State on appeal from it, held that the enactment of Iowa was but a "police regulation," and accordingly that it was valid. Judgment going accordingly the case was now brought here.

Messrs. H. C. Henderson and B. C. Cook, for the plaintiff in error:

Whether, if the United States had *not* legislated upon the matter of "compensation" to railroad companies carrying "freight and property on their way from any State to another State," the enactment of Iowa would be good as falling within the language of cases like *Ex parte McNiel*,† *Willson* v. *The Blackbird Creek Marsh Company*,‡ *Gilman* v. *The City of Philadelphia*,§ and others—in which it is said that the States may legislate but only until Congress sees fit to do so—it is wholly irrelative to the present case to inquire. For here Congress by its act of June 15th, 1866, *has* legislated. And there was great reason (it may be said incidentally) why at that time Congress should legislate. Then for the first time our railways were about to cross the Rocky Mountains, to span the continent, and unite oceans. The subject had now become one of National importance. Congress, aroused by the vastness of this enterprise, saw the subject in its true relations, commercial, postal, and military; and accordingly it meant to take and did take the whole subject under its care, for the protection and benefit of all the people

* Article 1, § 8.
† 13 Wallace, 240.
‡ 2 Peters, 250.
§ 8 Wallace, 728.

of the United States. The act itself shows all this. Its title is to "facilitate commercial intercourse . . . among the several States." Its preamble recites that the Constitution of the United States confers upon *it* (Congress), in express terms, the power to regulate commerce between them, and, "*therefore*," it enacts. Therefore it makes one *unconditional* provision about compensation to railroads carrying freight or property on its way, by steam and rail, "from any State to another State;" and there too it stops. Has not Congress then "regulated" the subject? If so, the right of the States by any view to do the same thing has ceased. It is unimportant that Congress while acting has not seen fit in its regulations to go into a great variety of details. Regulation does not necessarily consist in prescribing details, though when they are prescribed that too is "regulation;" perhaps not wise regulation. What, however, is wise regulation and what unwise, Congress must when acting on the subject alone decide, and it has decided. The right of the *State* to regulate at all has, therefore, ceased. Yet here the State does attempt to regulate, and not only so but to regulate in opposition to Congress. Congress gives to the railroad company the right "to carry," and to receive compensation "therefor;" that is to say, it gives to the company the right to receive compensation for carrying, simply. The company is not bound, "in the month of September," to *fix* "rates" or "freights," or "on the 1st day of October following," to "put up at all the stations and depots on its road a printed copy of such fare and freights;" and by the legislation of Congress no one can sue the company and recover any $100 or any $200 penalty for its "wilfully neglecting so to do." Congress leaves all this matter of fixing rates, and of announcing them, &c., to the agreement of the parties, and the laws of trade; and would refer any party aggrieved by a breach of contract to the ordinary remedies of justice. But the State comes in, and that very part of the subject which Congress has regulated, and regulated in one way, *it* attempts to regulate, and to regulate in a different way; a way which does not "facilitate commercial in-

tercourse among the several States," but which rather embarrasses it by exposing the companies to the vexation and odium of continual suits for *penalties*.

Further. As if to withdraw the whole matter in terms, from being interfered with by State legislation, the act of the National legislature says expressly:

"That *Congress* may at any time alter, amend, or repeal this act."

The court below considered that the action of the State was no regulation of commerce, and only a "police regulation." What is police? Sir William Blackstone has defined it in his Commentaries.* He says:

"By the public police and economy, I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive."

Police regulations are in their very nature local, confined to the States enacting them, and can have no force or operation beyond those things which are purely internal to such State. If they extend to or affect a commercial transaction between two or more States, or the citizens of two or more States, they so far cease to be police regulations and become regulations of commerce among the several States.

Now, this enactment was not local. If applicable to the case at bar as the court below held it to be,—since it gave judgment for an overcharge on the whole carriage from Chicago, in Illinois, to Marshalltown in Iowa,—the enactment applies as much to the whole road of the company as to any part of it; to that part of it in Illinois and other States as well as to that in Iowa, and to the freight or compensation earned in another State as to that earned in Iowa.

Messrs. J. Hubley Ashton and N. Wilson, contra:

Admitting that the transportation of property by railroads

* Vol. 4, p. 162; and see Bouvier's Law Dictionary, Title "Police."

is "commerce," does the enactment of Iowa attempt to regulate it? In no sense does it interfere with the business of the roads. It places no restriction or impediment upon the free transportation by them of either property or persons. The times and places when and where they should receive and deliver whatever they transport is not interfered with. The terms, conditions, and circumstances under which they shall transact their business are in no manner provided for. In short, transportation upon these roads is just as free, just as untrammelled, as it was before the act. The transportation itself by these roads is in no sense regulated. The regulations of the act extend to the prevention of abuses, injustice, and oppression toward the people, resulting from the unfair and unlawful practices of the agents and officers of the corporation or of the corporations themselves. It is intended simply for the protection of the people of the State, and in its practical operation has no other effect. In this view it is, as the court below held it to be, a police regulation, and within the scope of the authority of the State government. If the State may rightfully prevent, by fit legislation, railroad corporations from destroying the property of its citizens through the negligent acts of their servants, and provide penalties to be imposed for such acts, may it not interpose its authority to protect the people from greater losses by fraudulent and unfair dealings of such servants, or of the corporations themselves? If the most insignificant municipality within the State through which a railroad runs may prescribe the rate of speed to be run by the cars of the corporation engaged in the business of transportation, in "commerce," for the purpose of protecting the property or persons of its citizens, may not the State so legislate as to prevent fraud and impositions by the corporation or its servants? It would be strange if the State, to whom the people look for the protection of their private rights and the security of property, is powerless, as against these corporations, that owe their very being to charters derived from State legislation, to prevent loss and injury to its citizens by fraudulent and unfair dealing.

Recapitulation of certain facts, &c.

Police regulations, while they may even affect commerce and operate upon those engaged therein, are not obnoxious to the Constitution of the United States.* Quarantine and health laws, under which vessels engaged in commerce may be delayed for weeks in completing their voyages, or cargoes may be seized and destroyed, and sailors and soldiers of the United States imprisoned and punished for their violation, are constitutional. This court has very recently† said, that it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.

Mr. Justice SWAYNE delivered the opinion of the court.

The case lies within a narrow compass, and presents but a single question for our consideration. That question is not difficult of solution. The second section, chapter 169, of the laws of the ninth General Assembly of Iowa is as follows:

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood, and coal per ton, cord, or thousand feet, per mile; also, its fare and freight per mile for transporting merchandise and articles of the first, second, third, and fourth grades of freight; and on the first day of October following shall put up at all stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year. For wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than one hundred dollars nor more than two hundred dollars to any person injured thereby and suing therefor."

The plaintiff in error was sued in the proper District Court of the State for violations of these provisions. Among other defences interposed, the company plead that the statute was in conflict with the commercial clause of the Consti-

* Gibbons v. Ogden, 9 Wheaton, 1; Brown v. Maryland, 12 Id. 419; The Mayor v. Miln, 11 Peters, 102; License Cases, 5 Howard, 504; Passenger Cases, 7 Id. 283.

† State Tax on Railway Gross Receipts, 15 Wallace, 293; Osborne v. Mobile, 16 Id. 479.

tution of the United States. Fuller demurred to the plea. The court sustained the demurrer and the company excepted. The case was afterwards submitted to a jury. The company prayed the court to instruct them that the act was invalid by reason of the conflict before mentioned. The court refused, and the company again excepted. A verdict and judgment were rendered for the plaintiff. The company removed the case to the Supreme Court of the State, and there insisted upon these exceptions as errors. That court affirmed the judgment of the District Court, and the company thereupon prosecuted this writ of error. Was there error in this ruling?

The Constitution gives to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The statute complained of provides—

That each railroad company shall, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds;

That it shall cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year;

That a failure to fulfil these requirements, or the charging of a higher rate than is posted, shall subject the offending company to the payment of the penalty prescribed.

In all other respects there is no interference. No other constraint is imposed. Except in these particulars the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice.

It is not, in the sense of the Constitution, in any wise a regulation of commerce. It is a police regulation, and as such forms "a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all which can be most advantageously exercised by the States themselves."*

This case presents a striking analogy to a prominent feature in the case of *The Brig James Gray* v. *The Ship John Fraser*.† There the city authorities of Charleston had passed an ordinance prescribing where a vessel should lie in the harbor, what light she should show at night, and making other similar regulations. It was objected that these requirements were regulations of commerce and, therefore, void. This court affirmed the validity of the ordinance.

In the complex system of polity which exists in this country the powers of government may be divided into four classes:

Those which belong exclusively to the States.

Those which belong exclusively to the National Government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the States but only until Congress shall see fit to act upon the subject.

The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur.‡

Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on.§

The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To

* Gibbons v. Ogden, 9 Wheaton, 1.
† 21 Howard, 184.
‡ Ex parte McNiel, 13 Wallace, 240.
§ 2 Story on the Constitution, §§ 1061, 1062.

that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

Others may well vary with the varying circumstances of different localities. Where a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authority of a State, such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so. A few of the cases illustrating these views will be adverted to.

In *Willson* v. *The Blackbird Creek Marsh Company*,* under a law of the State of Delaware, a dam had been erected across the creek. This court held that the dam was a lawful structure, because not in conflict with any law of Congress.

In *Gilman* v. *The City of Philadelphia*,† the State of Pennsylvania had authorized the erection of a bridge over the Schuylkill River, in the city of Philadelphia. This court refused to interpose, because there was no legislation by Congress affecting the river. The authority of Congress over the subject was affirmed in the strongest terms.

In *The Wheeling Bridge Case*,‡ the bridge was decreed to be a nuisance, because Congress "had regulated the Ohio River, and had thereby secured to the public the free and unobstructed use of the same." Congress subsequently legalized the bridge, and this court held the case to be thereby terminated.

In *Cooley* v. *The Board of Wardens*,§ the validity of a State law establishing certain pilotage regulations, was drawn in question. It was admitted by this court that the regulations were regulations of commerce, but it was held that they were valid and would continue to be so until superseded by the action of Congress.

In *Ex parte McNiel*,‖ the same question arose, and the doctrine of the preceding case was reaffirmed.

* 2 Peters, 250. † 3 Wallace, 728. ‡ 18 Howard, 430.
§ 12 Howard, 319. ‖ *Supra*.

Syllabus.

In *The James Gray* v. *The John Fraser*,* stress was laid upon the fact that there was no act of Congress in conflict with the city ordinance in question. See, also, in this connection, *Osborne* v. *The City of Mobile*.†

If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce*, the question would arise, whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject.

JUDGMENT AFFIRMED.

HORN *v.* LOCKHART ET AL.

1. When objection is taken to the jurisdiction of the Circuit Court of the United States by reason of the citizenship of some of the parties to a suit, the question is whether to a decree authorized by the case presented they are indispensable parties. If their interests are severable from those of other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.
2. To a suit brought in the Circuit Court of the United States by legatees in a will to compel an executor to account for moneys received by him from sales of property belonging to the estate of his testator, and to pay to them their distributive shares, it is no answer for the executor to show that he invested such funds in the bonds of the Confederate government by authority of a law of the State in which he was executor, and that such investment was approved by the decree of the probate court having settlement of the estate. Such investment was a direct contribution to the resources of the Confederate government, and was an illegal transaction, and the decree of the probate court approving the investment and directing the payment of the distributive shares of the legatees in such bonds was an absolute nullity, and affords no protection to the executor in the courts of the United States.

---

* 21 Howard, 184. † 16 Wallace, 479.

8. The acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding.

APPEAL from the Circuit Court for the Southern District of Alabama; the case being thus:

In March, 1858, one John Horn, of Marengo County, Alabama, died, leaving a considerable estate, including a homestead plantation of 720 acres, a smaller tract of 208 acres, with other pieces of land, seventy-eight negro slaves, and other personalty; and leaving also a widow and six children, among them a son, John A. C. Horn, and daughters; one married to William Lockhart, another married to Charles Lockhart, and a third married to one McPhail. These three daughters, with their husbands, resided in Texas. The rest of the children and the widow resided, as the decedent had done, in Alabama. In May, 1857, the deceased made a will, which was in existence up to a short time prior to his death. His said son alleged that it had been afterwards fraudulently purloined and destroyed. The daughters alleged that their father voluntarily destroyed it before his death.

Soon after the death of Horn, the son procured himself to be appointed administrator *ad colligendum*, and by petition in the Probate Court of Marengo County, set up a paper which he alleged to be a true copy of his father's will, with allegations as to its spoliation, &c., and praying that it might be established as his will. The widow and all the children residing in Alabama, were duly cited to appear and show cause why the alleged will should not be admitted to probate. As the Lockharts with McPhail and wife resided in Texas, a notice of the time and place set for the hearing was duly published in a newspaper, as authorized and required by the laws of Alabama. Some only of the parties interested appeared, and contested the probate of the alleged will. The question as to its validity was tried by a jury according to the laws of Alabama; and it was estab-

lished by their verdict and the judgment of the court in September, 1858. In November following, letters testamentary were issued to the son, as the executor.

By the will thus established, the homestead was given to the son after his mother's decease, and the smaller tract of 208 acres was directed to be sold and the proceeds divided equally amongst the daughters. The residue of the estate was to be equally divided between all the children. The widow repudiated the will and claimed her dower.

On the 29th of December, 1858, by order of the court, a division of the slaves of the testator was made between his widow and children, by commissioners appointed for the purpose and upon a valuation then made. The daughters severally, with their husbands, gave receipts for those which were assigned to them in this division; the receipts reciting that the slaves received were in full of their distributive share of the negro property of the deceased. At the same time the executor made payments of money to the daughters, and took receipts for the amounts, reciting that they were in part payment of their claims against the estate.

In October, 1859, the executor filed a partial account of his administration, including his sales of property at the said division of slaves. Some of the items of the account were contested, but in May, 1860, a decree was finally made by which it was declared that the executor had in his hands for distribution $10,783, proceeds of the land sold and to be divided among the daughters, and $5159, proceeds of personal property to be divided among the widow and children in accordance with the will, specifying the amount payable to each. Such division was accordingly made, and receipts taken by the executor from the parties.

In August, 1860, and January, 1861, a citation was issued at the suit of some of the daughters to call the executor to a final account. There was then a balance in his hands due from one Craighead, the purchaser of the real estate, devised for the benefit of the daughters. It had been sold on the 8th of January, 1859, on a credit of twelve months, for $10,400, of which $6240 had been paid in good money by

the purchaser, and included in the partial account settled in May, 1860. But there was still a balance due of $4160, besides interest. Craighead died in June, 1859. His wife took out letters of administration on his estate. By the laws of Alabama, she, as administrator, could not have been sued until after six months from the grant of letters of administration, but the executor did not bring suit after that term had elapsed for the balance thus due from the estate; nor did he collect the amount until October, 1862, when he took it in Confederate notes, amounting to $5075.

He kept this money, and other money of the estate which he had previously received from certain sales of property, in Confederate funds in his hand until March, 1864, when, under sanction of laws of Alabama then existing, he deposited $7900 thereof as executor in the Confederate States depository office at Selma, Alabama, and received a certificate entitling him to Confederate States four per cent. bonds to that amount. The receiving of money by Horn, Jr., as executor, in Confederate notes, and the investment of said notes in Confederate bonds, were in strict accordance with laws passed by the legislature of Alabama in November, 1861, and November, 1863, whilst that State was engaged in rebellion against the United States.

In May, 1864, on the 2d of that month, the final accounts of the executor were passed in the probate court after due publication of notice, and he resigned his executorship in accordance with the laws of Alabama. The final decree recited the fact that it appeared that the executor had invested the moneys of the estate in his hands, being proceeds of sales of property of the estate, in four per cent. Confederate bonds, and approved and confirmed the same, and directed the several shares of the widow and children of the deceased to be paid to them in said bonds. The bonds were never accepted by the legatees, nor did it appear that they were ever tendered to them by the executor.

In this state of things, the Lockharts, resident as already mentioned in Texas, filed their bill, on the 15th of November, 1867, in the court below, against Horn, the executor, the

widow, and the other daughters and their husbands (all of them being residents of Alabama, *except McPhail and wife, who, as already said, resided, as did the complainants themselves, in Texas*), to set aside the alleged will, which had been admitted to probate in September, 1858, and to recover their distributive share of the estate of their father, or in case the will should be sustained, to recover from the executor the balance due them as legatees, which he had invested in Confederate bonds; they insisting in their bill that there was no law, either valid or pretended, which authorized the Probate Court of Marengo County to render a decree making the amounts due them payable in Confederate bonds, and alleging that no such bonds were ever paid to or received by them.

Objection was taken in the Circuit Court to its jurisdiction, on account of the residence of these two defendants in the same State with the complainants.

The court in its final decree directed the bill to be dismissed as to these two defendants, as not being essential parties to the suit by the complainants.

On the main question the court held that the complainants were barred by the statute of limitations of Alabama, from filing a bill to set aside the will, and were estopped from doing so by their own acts, inasmuch as after the will was admitted to probate they had twice received, without objection or protest, dividends of the property of the deceased, founded on the directions of his will, and gave to the executor acquittances therefor; that in this they had recognized the will, and recognized the son as the executor thereof, and that they could not afterwards come into a court of equity without any allegation of fraud or concealment, or newly discovered evidence, and ask to have the will set aside.

But the court held that the executor could not exonerate himself from liability for the balance adjudged due the legatees, by paying the same in Confederate bonds. It observed that as a general rule all transactions, judgments, and decrees which took place in conformity with existing

laws in the Confederate States between the citizens thereof, during the late war, *except such as were directly in aid of the rebellion, ought to stand good;* that the exception of such transactions was a political necessity required by the dignity of the government of the United States, and by every principle of fidelity to the Constitution and laws of our common country; that by this rule the present case must be judged, and that by this rule the deposit of the $7900, money of the estate, in the depository of the Confederate States at Selma, could not be sustained, as it was a direct contribution to the resources of the Confederate government. The decree of the court, therefore, directed the executor to pay to the complainants in lawful money of the United States the several sums adjudged to be due to them by the probate court on the rendition of his final account in May, 1864. From this decree an appeal was taken by the executor alone.

The case was twice argued.

Mr. P. Phillips, for the appellant:

I. The final decree is the first notice which the record gives of the dismissal of the bill as to McPhail and wife. But whether or not the court had jurisdiction of the cause must be determined by the state of the cause when it was submitted for decision. Even *Conolly* v. *Taylor*,* which may be relied on by the other side, does not justify the action in this case. Counsel there had been arguing that the jurisdiction depended on the state of the parties *at the commencement of the suit.* The Chief Justice says, in reply, that the defect may "be corrected at any time *before* the hearing." Again he says:

"Had the cause *come on for a hearing* in this state of parties a decree could not have been made for want of jurisdiction. The name of the citizen, plaintiff, was, however, struck out of the bill *before the cause was brought before the court.*"

The bill here is filed by the Lockharts to set aside a will, to have distribution made of the estate, and an account against

* 2 Peters, 564.

the executor. In such a bill McPhail and wife were necessary parties,* and in dismissing the bill as to them to cure the defect of jurisdiction, it was made defective for want of necessary parties.

II. It is not necessary to argue that the decree of the probate court, though made during the civil war, was not *for that reason void.* The court had jurisdiction of the subject-matter and of the parties. In recognizing the legality of the investment in Confederate bonds, and ordering distribution in them, it had the sanction of the laws of the State and of the Confederate States, under whose dominion it exercised its functions. All the parties to the controversy were voluntarily under this dominion, and whatever was consummated under these laws cannot be readjudicated except by provisions of law enacted for that purpose. Admitting, for the argument, that these laws could be held as invalid, the only consequence would be, not that the decree of final settlement was void, but that it was erroneous, and the time and manner for correcting the error must be looked for in the statutes of the State.† That the present decree was final, and concluded all the parties, until reversed, was decided by the Supreme Court of the State, in 1870,‡ in a proceeding by one of the parties to the present bill, who sought to open it.

[The counsel then, in order to ascertain particularly what these laws were, gave a history of legislation *during* the war, inferring from it as plain that all parties aggrieved by judgments or decrees rendered during the civil war had a remedy by way of new trial or appeal.

He also referred to statutes *prior* to the war, allowing a bill to correct any error in a settlement with an executor in the decree of the probate court, if filed within *two years* from the date of the decree; arguing that after making all allowances this bill was about two months too late.]

But if the bill had been filed in time, the decree was

* Barney v. Baltimore, 6 Wallace, 283.

† Wyman v. Campbell, 6 Porter, 219; Thompson v. Tolmie, 2 Peters, 162; Beauregard v. City of New Orleans, 18 Howard, 502.

‡ Horn v. Bryan, 44 Alabama, 88.

wrong in holding the executor liable by reason of his funding the Confederate money. It is said that this was an act in aid of the rebellion which the dignity of the government will not allow to stand good. But, how so? This is not a case where a party is asking the aid of the court to enforce an illegal contract or to enforce a right arising under an unconstitutional law; but is an appeal to the court to relieve one of the parties to a consummated act to set aside a judgment rendered under a government exercising full dominion over all the parties to it, and with their assumed assent. In such a case it does not lie in the mouth of a complainant to say that the court of probate could not exercise judicial power during the war, nor that these proceedings are erroneous in carrying into effect the laws of the Confederate government, because made to facilitate the war against the government of the United States. If the statute was illegal the complainants must be considered in law as having been parties to it, and as responsible and as much bound as if the record had shown that they were themselves the authors of it; as between citizens thus situated all consummated acts are beyond the reach of judicial revision. The court will not lend its aid to them to undo their own acts.

It may be stated here as matter of fact that the law of the Confederate government, under which the investment under consideration was made, and which was passed on the 15th of February, 1864, required Confederate notes to be funded by a certain time, and enacted that on failure to have them so funded they should no longer be receivable for public dues; they were also to be taxed 33⅓ per cent., and in addition thereto 10 per cent. a month. Now, if the executor under this law had failed to fund, and allowed the notes to perish on his hands, the complainants in the courts of the Confederacy would have had a perfectly clear case for condemning him. Can they now come into the courts of the United States and hold the executor liable on the opposite ground?

These principles here advanced have been fully sustained

by the highest court in Alabama, Mississippi, and Virginia.*

The conduct of a trustee or agent must not be judged of by matters *ex post facto*.

The funding by the executor can in no just sense be considered as an act "in aid of the rebellion." It is not pretended that the funding was made with such intention, but, whether with or without intent, was it such an act? By funding the notes the debt of the Confederacy was neither augmented nor diminished; its form was only changed. By failing to fund, the debt was diminished by so much currency made valueless, without any increase in the bonded debt. It is therefore evident that, with the alternative before him to fund or not to fund, the executor acted in the mode least beneficial to the finances of the Confederacy, and for so acting—that is to say for not having given greater aid to the rebellion—the decree holds him liable!

Admit, however, that this funding was illegal, and that consequently the executor is liable as for a conversion, this would not charge him in specie or its equivalent with the amount of the funds converted. The money which he received was, of course, Confederate notes (the only currency of the South), and the measure of his liability is their value at the time of conversion.† To this extent the decree ought in any view to be modified.

Mr. J. T. Morgan, contra.

Mr. Justice FIELD delivered the opinion of the court.

The validity of the will of John Horn, deceased, is not a question for our consideration. The Circuit Court held that the statute of limitations of Alabama had barred the right of the complainants to contest its validity, and also that they were estopped from such contestation by accepting, without objection or protest, dividends of the property founded upon the directions of the will. The executor and principal de-

* Watson and wife v. Stone, 40 Alabama, 451; Trotter v. Trotter, 40 Mississippi, 710.

† Head v. Talley, Administrator, 8 American Law Times, No. 9, p. 155.

visee does not, of course, controvert the correctness of this decision, as it sustains his position, and the complainants have not appealed.

The case, as presented to us, therefore, is one where an executor in Alabama is alleged to have misappropriated funds of an estate, to which legatees in Texas were entitled; and to enforce from the executor an accounting and payment the legatees ask the aid of a court of the United States.

The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them. They were not indispensable parties, that is, their interests were not so interwoven and bound up with those of the complainants, or other parties, that no decree could be made without necessarily affecting them. And it was only the presence of parties thus situated which was essential to the jurisdiction of the court. The rights of the parties, other than the defendants who were citizens of Texas, could be, and were, adequately and fully determined without prejudice to the interests of those defendants. And the question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.*

Upon the accounts presented by the executor to the probate court in Alabama for settlement, it appears that he received moneys from the sales of property belonging to the estate of the testator, amounting to over seven thousand dollars, and invested the same in bonds of the Confederate States. By the decree of the probate court this investment was approved, and the executor was directed to pay the legatees their respective shares in those bonds. Now the question is whether this disposition of the moneys thus received,

* See Barney v. City of Baltimore, 6 Wallace, 280; and Shields v. Barrow, 17 Howard, 180.

and the decree of the court, are a sufficient answer on the part of the executor to the present suit of the legatees to compel an accounting and payment to them of their shares of those funds.

It would seem that there could be but one answer to this question. The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government, could make such a transaction lawful.

We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution. The validity of the action of the probate court of Alabama in the present case in the settlement of the accounts of the executor we do

not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States.

The act of Alabama which the executor invokes in justification of the investment has been very properly pronounced unconstitutional by the highest tribunal of that State,* and the attempt of its legislature to release executors and trustees from accounting for assets in their hands invested in a similar manner rests upon no firmer foundation.

Had the legatees of the testator voluntarily accepted the bonds in discharge of their respective legacies, the case would have presented a very different aspect to us. The estate might then have been treated as closed and settled, but such is not the fact. The bonds were never accepted by the legatees, nor does it appear that the executor even went so far as to offer the bonds to them.

It is urged by counsel for at least a modification of the judgment of the Circuit Court, that the money received by the executor was in Confederate notes, which at the time constituted the currency of the Confederate States. It does not appear, however, that he was under any compulsion to receive the notes. The estate came into his hands in November, 1858, and no explanation is given for his delay in effecting a settlement until the war became flagrant. And even then he was not bound to part with the title to the property in his hands without receiving an equivalent in good money, or such, at least, as the legatees were willing to accept.

DECREE AFFIRMED.

Dissenting, Mr. Justices SWAYNE, DAVIS, and STRONG.

NOTE.

At a subsequent day a motion for rehearing was made, and an elaborate brief by Mr. Phillips filed in support thereof. The motion, however, after advisement, was DENIED.

* Houston v. Deloach, 43 Alabama, 364; Powell v. Boon & Booth, Ib. 459.

THE MERRITT.

1. A vessel built in the British Province of Canada, but owned wholly by citizens of the United States, cannot under the Registry Act of 1792 (1 Stat. at Large, 287) be a vessel of the United States; nor can she be a foreign vessel truly and wholly belonging to citizens of Canada or of Great Britain. If, therefore, such a vessel be engaged in transporting the products of Canada into ports of the United States, she may be forfeited under the act of March 1st, 1817 (3 Stat. at Large, 351), which enacts, under penalty of forfeiture, that "no goods, wares, or merchandise shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture."
2. Nor, assuming that neither Great Britain nor the Dominion of Canada have adopted "a similar regulation," could the vessel, in the absence of all documents, such as establish nationality, be taken to be a British or Canadian vessel, and so held to fall within the proviso to the above quoted enactment, which provides, "that this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation."

APPEAL from the Circuit Court for the Eastern District of Wisconsin; the case being thus:

By a statute of 1792,* it is enacted that no ships but those which have been registered in the manner therein prescribed, shall be denominated or deemed vessels of the United States, entitled to the benefits or privileges appertaining to such ships. Great Britain has a similar regulation, fixing what are to be regarded as British vessels.

By an act of March 1st, 1817,† it is enacted,

"SECTION 1. That after the 30th day of September next, no goods, wares, or merchandise shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture; or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation.

* 1 Stat. at Large, 287. † 3 Id. 351.

Argument for the claimant.

"*Provided, nevertheless,* That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation."

A subsequent section of the latter act enacts that the vessel and cargo coming into the United States, in violation of those provisions, shall be forfeited.

In this condition of things—as appeared by the libel, information, and answer hereafter mentioned—the bark Merritt, built in the province of Canada and within the dominion of Great Britain, but wholly owned by citizens of the United States, was employed in transporting coal and iron, products of the said province of Canada, from the port of Kingston, in the province named, into the port of Milwaukee, Wisconsin, in the United States.

Hereupon, a libel and information was filed in behalf of the United States alleging the facts above stated. One Murray, owner of the vessel, interposed as claimant, and not denying the allegations, answered, that at the time of the importations on account of which the proceedings were taken, neither the imperial government of Great Britain nor the Dominion of Canada* had adopted any "similar regulation" to that contained in the above-quoted act of 1817; and that, therefore, the case was taken out of the statute by the proviso to it. This answer was excepted to as irrelevant; that is to say was, in effect, demurred to; and the exception or demurrer being sustained by the court below, on an appeal from the District Court, the case was now brought here by Murray for review. The vessel had exhibited no papers.

Mr. N. J. Emmons, for the claimant, appellant in this court:

1st. If the Merritt is a *foreign* vessel—as she needs must

* This averment as to the Dominion of Canada was made, of course, under the supposition that the act of 30 Victoria, chapter 3 (2 Law Reports Statutes, § 91, p. 21), which, it was said, gives to the Parliament of Canada (subject to a power of veto in the Crown) exclusive regulation in "the regulation of trade and commerce," and "in navigation and shipping," might have made it a "country" within the meaning of the enacting clause of the act of 1817. As the vessel showed no papers from any source the point was unimportant.

be to bring her within the regulations of the act of 1817—she was either British or Canadian, it matters not which. As such, she would not be liable, falling within the proviso to section one, "that this regulation shall not extend to *the vessel of any foreign nation which has not adopted and which shall not adopt a similar regulation.*"

The act of 1817 was intended to retaliate upon Great Britain her unfriendly legislation on the subject of it, commencing with her act of 12th Charles II, "for the encouraging and increasing shipping and navigation," and continued by numerous subsequent enactments, all of which were supposed to have been reserved in force by the convention between the United States and Great Britain of July 3d, 1815.* We could show, we think, if it would aid us, the unqualified repeal by Parliament, long prior to the alleged offence, of all its legislation on the subject. Our allegation of fact is, that there was no regulation by either Great Britain or Canada "similar" to that of our act of 1817; that, on the contrary, American vessels were freed and absolved from all such restraints. This averment, however, stands admitted by the exception.

2d. If the Merritt was not a *foreign* vessel, that is to say, a vessel to which no distinct nationality could be assigned, then she has been guilty of no infraction of the law. If by the act of transfer from British to American citizens, she was utterly denationalized, and became a mere rover of the sea, without country, then she is not within the act of Congress. The act was not directed against such possible class of ships. It was not the mischief intended to be cured. We must have new legislation to forfeit a vessel thus circumstanced.

Mr. Solicitor-General S. F. Phillips, contra:

The policy of the act of 1817, which is to foster free trade between the United States and such foreign nations as adopt

* The Ship Recorder, 1 Blatchford's Circuit Court, 218, decided in 1847, chap. 18, § 4, 7 British Stat. at Large, 452.

a similar policy, does not cover the vessel seized here, which has no national character whatever. The Merritt is not *American*;* nor is it *British*,† nor Canadian. She must, therefore, be a *foreign* vessel within the meaning of the act.

Mr. Justice HUNT delivered the opinion of the court.

The first section of the act of 1817 prohibits the importation of any goods or wares from any foreign port into the United States, except in two cases:

1st. They may be imported in vessels of the United States; or,

2d. In such foreign vessels as truly and wholly belong to the citizens or subjects of the country of which the goods are the production, or from which they are most usually first shipped for transportation.

The claimant's answer does not bring him within either of these classes.

1. The Merritt is not a vessel of the United States. The information alleged—it was not denied—and that is all that the case contains upon the subject,—that the Merritt was the property of citizens of the United States, and that she was a foreign-built vessel. That she was owned by citizens of the United States did not make her a vessel of the United States. By the statute of 1792 only ships which have been registered in the manner therein prescribed shall be denominated or deemed vessels of the United States, entitled to the benefits or privileges appertaining to such ships. There is no allegation that the Merritt had been so registered. Indeed, she could not have been under the provisions of the act last referred to.

2. The cargo of the Merritt was iron and lumber, the production of the British provinces of Canada, while her owners were citizens of the United States. She did not, therefore, come within the second description of the statute of 1817,

* See act of 1792, ch. 1, 1 Stat. at Large, 287; 1 Parsons on Shipping, 28.

† Abbott on Shipping, 79, and (since) 17 and 18 Vict., c. 104; 18 and 19 Vict., c. 91; 25 and 26 Vict., c. 63.

as a foreign vessel truly and wholly belonging to citizens of the country of which the cargo was the growth or production. On the contrary, it is conceded by the pleadings that her owners were American citizens. The Merritt, therefore, falls within the prohibition of the act, and is liable to forfeiture. She was neither a vessel of the United States nor a foreign vessel, wholly belonging to citizens of the country of which her cargo was the production.

But the claimant seeks the benefit of the proviso of the act, viz.: "That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and shall not adopt, a similar regulation." He alleges that neither the kingdom of Great Britain nor the province of Canada has adopted similar regulations.

The case does not show that the Merritt has any of the evidences of being a British ship. She produces no register, or certificate, or document of any kind to entitle her to make that claim. The fact that she is foreign-built does not prove it. Proof even that she was built in Great Britain would not establish it. Pirates and rovers may issue from the most peaceful and most friendly ports. The documents a vessel carries furnish the only evidence of her nationality.* Of these the Merritt is entirely destitute, so far as the case shows. There is nothing, therefore, to bring her within the terms of the proviso.

DECREE AFFIRMED.

KNODE v. WILLIAMSON.

1. Where a notice to take depositions at a place specified informed the opposite party that they would be taken on a day named, and that the taking would be adjourned "from day to day until completed," and, a portion of the witnesses, having been examined (at whose examination the opposite party with his counsel attended), the taking of the examination of the others was adjourned until the next day, when it was again adjourned until the next succeeding day, and so on, from day to day till a particular day, when the taking of the testimony was completed in

* See 1 Parsons on Shipping and Admiralty, 26, 27.

Particulars of the first case, and opinion of the court.

the absence of both the opposite party and his counsel. *Held*, that an exclusion of the deposition on the ground of want of sufficient notice was error.

2. Where the purpose of testimony is to impeach a witness for want of veracity, it is not improper to ask the person on the stand what is the general "reputation" for truth of the witness sought to be impeached. It is even more proper than to ask what is his general "character" for truth; though the question is sometimes asked in the latter form; the word "character" being then used as synonymous with "reputation."
3. A notice without date, given to a party that depositions will be taken "on the 12th of September" (no year mentioned), at the office of a person named, "in the *city* of Guilford, State of Maine," is insufficient to let in a deposition taken on the 12th of September, 1867, "in the *town* of Guilford;" it not appearing whether the town or township of Guilford was the same as the city of Guilford; and the opposite party not having attended at the taking of the depositions, and so waived the defect in the notice.

ERROR to the District Court for the District of West Virginia.

Knode sued Williamson in the court below in trespass.

In the course of the trial the plaintiff offered in evidence the deposition of J. A. Chapline, which the court excluded.

He also offered in evidence the depositions of certain persons, Biddle, Jamieson, and others, which the court equally excluded.

The defendant, on the other hand, offered in evidence the deposition of a certain Ellis, which the court admitted.

Verdict and judgment having gone for the defendant, the plaintiff brought the case here on exceptions to the exclusion of the two first-mentioned depositions, and the admission of the last-mentioned one.

Mr. C. W. B. Allison, for the plaintiff in error; Mr. W. W. Boyce, with whom was Mr. C. J. Faulkner, contra.

Mr. Justice STRONG stated the particular circumstances under which the respective depositions that were the subject of the court's action complained of were taken, and delivered the opinion of the court on each case.

We think the District Court erred in excluding the depo-

sition of Chapline. It had been taken in the cause, in pursuance of notice that, together with the depositions of other witnesses, it would be taken on the 11th day of September, 1869. The notice also informed the defendant that taking of the depositions would be adjourned from day to day until they were completed. So long as such adjournments were in fact made, he was, therefore, informed of the times when he might attend for cross-examination. On the day first designated he did attend, with his counsel, and some depositions were taken. But all the witnesses not having been examined, the taking was adjourned until the next day, when it was again adjourned until the next succeeding day; and so on, from day to day, until September 18th, when the deposition of Mr. Chapline was taken in the absence of both the defendant and his counsel. All the adjournments, however, were from day to day, and consequently it was the duty of the defendant to take notice that depositions might be taken on any day to which an adjournment was made.

We think, also, the court erred in rejecting the depositions of Biddle, Jamieson, and others, mentioned in the bill of exceptions. They were offered to impeach the character or reputation of Thomas Noakes, a witness examined on behalf of the defendant. They had been taken regularly, and the only objection urged against their admissibility is, that the witnesses were asked if they knew the general "reputation" of Noakes for truth; instead of being asked whether they knew his general "character." The question was precisely what it should have been. It is true that in many cases, it has been said, the regular mode of examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach, but in all such cases the word character is used as synonymous with reputation. What is wanted, is the common opinion, that in which there is general concurrence, in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question.

Particulars of the third case, and opinion of the court.

The only remaining assignment of error relates to the admission of the deposition of Ellis. It had been taken under a commission sent to the State of Maine, in another case between the same parties, in which the cause of action was the same as in the present case, but it had not been used in the trial of that other case. It also appeared that the witness was beyond the district, and a resident of another State, when his deposition was offered. But there was a material defect in the notice given to the plaintiff of the time and place of taking, which was not waived by any attendance before the commissioner. The notice was without date, addressed to the attorney of the plaintiff, informing him that the deposition would be taken on the 12th of September (year not mentioned), at the office of Henry Hudson, in the city of Guilford, State of Maine, between certain hours, and that if from any cause the taking of the deposition should not be commenced on that day, or, if commenced, should not be concluded, the taking thereof would be adjourned and continued from day to day, or from time to time, at the same place, and between the same hours, until completed. No other notice, either of the commission or of the time and place of taking the deposition, appears to have been given. It was taken, not in the city of Guilford, but in the *town* of Guilford, on the 12th day of September, 1867. Whether the town, or township of Guilford is the same as the city of Guilford does not appear. But a party who attempts to use the deposition of an absent witness must show that he has given his adversary an opportunity to cross-examine by a notice that is definite and certain, unless the failure to give such notice has been waived. Such was not the notice given in this case, and the deposition was, therefore, erroneously received in evidence.

JUDGMENT REVERSED, AND A NEW TRIAL AWARDED.

Statement of the case.

HARRELL v. BEALL, ASSIGNEE.

Where a question brought to this court is wholly one of the weight of evidence, involving no controverted proposition of law, this court will not, under the pressure of business which now rests upon it, consider itself justified in reproducing in its opinion the facts on which its judgment rests. It will content itself with announcing fully its conclusions upon the evidence.

APPEAL from the Circuit Court for the Southern District of Georgia.

Beall brought a suit in chancery in the court below, in his character of assignee in bankruptcy of one Jarrell, against a certain Harrell and one Echols, to set aside what he charged to be a fraudulent sale to Echols of the bankrupt's property, and to have the property subjected to the payment of debts in the bankruptcy proceeding.

The material allegations of the bill were, that the bankrupt, in a state of insolvency, procured the sale of valuable real estate belonging to him, under judgments which were a lien on it, and that by collusion with Echols, who was his clerk and agent, it was bought in by Echols for a merely nominal sum, one out of all proportion to its real value; that the purchase was made really for Jarrell, and the money, if any, which was actually paid on the execution sale was furnished by Jarrell; that the title to the land and some notes for rent remained in Echols's name until he disposed of them, as it was charged that he had done, to the defendant, Harrell; that Harrell purchased with notice of the fraudulent conduct of Echols, and for a sum far below the value of the property purchased.

The defence of Harrell was, that there was no fraud in the original purchase by Echols, and if there was any, that he, Harrell, was an innocent purchaser for value without notice.

The question was thus one of fact only.

Upon a large quantity of evidence, which when coming to this court filled a transcript or record-book that covered

seventy-one 8vo. pages in a style that would make at least one hundred and twenty-five pages like the body of these Reports, the court below considered that the sale to Echols was a plain fraud; and that if Harrell, who had purchased from Echols, failed to perceive that it was so, his failure arose from a culpable inattention to what he was bound to attend to. That court accordingly decreed in favor of the assignee. Harrell alone appealed.

Harrell, propriâ personâ, argued his case, orally, and filed a brief of his own, and also one of Mr. A. T. Akerman.

No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The appellant has furnished a brief and an oral argument which have received the attentive consideration of the court. There is no appearance here for the appellee, and this has made us more careful in the examination of the record.

The question is wholly one of the weight of evidence, involving no controverted proposition of law; and the pressure of business on this court will not justify us in reproducing in our opinion the facts on which our judgments rest in such cases. It must suffice to say that we are convinced that the sale to Echols was a barefaced fraud, and that if the appellee did not know it when he purchased of Echols it was because he intentionally shut his eyes to the truth, and that he had such notice and information as made it his duty to inquire further, and that the slightest effort by him in that direction would have discovered the whole fraud.

Such were the views on which the decree below was founded, and it is accordingly

AFFIRMED.

Dissenting, Mr. Justice DAVIS.

MANUFACTURING COMPANY v. UNITED STATES.

Where a manufacturer of guns agrees with the government to make and deliver, and the government agrees to receive and pay for, all the carbines of a certain kind (described) not exceeding six thousand, which the manufacturer can make within six months from the date of the contract, and the government afterwards requests that certain alterations may be made in the weapon, to effect which necessarily requires some months, and the alterations (along with others of the manufacturer's own suggestion, which were judicious and materially improved the weapon) were made; the request of the government to make the alterations implies such a reasonable extension of the time as is requisite to make them, and if the government was aware of the progress of the work, and gave no notice that it would refuse to accept the same if not delivered within the six months originally specified, it must be held to be bound by the reasonable intendment above mentioned; and if after the request to make the alterations, the manufacturer proceeded in good faith and without unnecessary delay, the government was bound to accept the six thousand carbines though not delivered within the six months; and having refused so to accept is bound to pay such damages as the manufacturer has sustained by the government's said refusal.

APPEAL from the Court of Claims.

The Amoskeag Manufacturing Company brought suit in the Court of Claims against the United States on a contract, by which the company had agreed to make and deliver, and the United States had agreed to receive and pay for, all the Lindner carbines, not exceeding six thousand, which the company could make in six months from the 15th day of April, 1863, to be approved and inspected by Major Hagner, and by which for each carbine so inspected and delivered the United States was to pay $20.

Immediately after making this contract, the company entered upon the preparations necessary to the performance of the work; and it was found as a fact by the Court of Claims that the company had the necessary means and facilities, and could have delivered the six thousand carbines of the kind contracted for within the six months limited, in conformity with the agreement as first made, had not changes and alterations been desired and requested by the government.

In regard to these changes, the court found that General Ripley, chief of ordnance, by letter of the date of April 23d, 1863, requested certain alterations to be made in the construction of the carbine; that these were made by the contractors as requested, and that these necessitated other changes to make the parts conform, and also alterations in the machinery, and new tools and fixtures to perform the work. Other changes were made in the construction of the weapon by the contractors, on their own motion, which were important and judicious, and which materially improved it. How much time these changes required did not precisely appear; but it was admitted that they necessarily required two or three months, a part of which resulted from the action of the department, and that the contractors proceeded in good faith and without unnecessary delay.

It was further found that, on or about the 5th of April, 1864, the company exhibited one of the weapons for inspection, and gave notice to the department that the company was then ready to commence delivery, and would deliver the entire six thousand as rapidly as the government could inspect them, and asked that they should be then inspected and received by the department, which was not done then and had not since been done. It was further found that inspection of contract arms was always made at the place of manufacture, and was made of the parts of the arm before they were put together. It was also found that the time consumed by the company in filling the contract beyond the time fixed by its terms, to wit, six months, was rendered necessary and indispensable by the changes, alterations, and delays caused solely by and for the interest of the government; and further that the government was aware of the progress of the work, and gave no notice that it should refuse to accept the work if not delivered within the six months. The arms were inspected by a competent person, and found to be according to contract, and were packed in cases and tendered to the government, which refused to receive or pay for them.

The six thousand carbines were still at the time of this

suit, brought March 15th, 1870, in the hands of the company, not having been offered for sale, and on the 21st of March, 1871, when the Court of Claims gave its judgment, were worth, according to the finding of the court, $3 each. Their value or market price at any previous time was not found. The Court of Claims (by an equally divided court) dismissed the petition, and the manufacturing company appealed.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, in support of that dismissal:

The contract was to take, not a definite number of carbines, but all that could be furnished within six months, whether fifty or five thousand, so that they did not exceed six thousand. In other words, the contract was for the results of the industry of the plaintiff on such carbines, limited to six months, be the results small or large, so that the carbines did not exceed, in number, six thousand.

The slight changes suggested by the United States would not, apparently, either by their direct or indirect effect, have diminished the percentage of those results to any considerable extent. The case, as made out by the company, leaves the court ignorant of that extent. The company *mingled* the effect upon the *time* of delivery, of the changes required directly or indirectly by the government, with that of those other *improvements* added of its own head. This is a sort of *voluntary confusion* of effects that justified the decree below.

We need not say how very important *time* is in all matters concerning a flagrant war, or how especially important during the year 1863 of the late war. The variation of a performance under which the government in 1863 might reasonably have expected several thousand arms from time to time within six months, to one in which it was to receive none for a year, was a variation of capital magnitude.

Messrs. C. F. Peck and W. W. McFarland, contra.

Mr. Justice MILLER (having recited much as the reporter has given them, the chief points of the findings of the court below) delivered the opinion of the court.

We think that the statement of this case, as it appears in the main points in the findings of the Court of Claims, is the best argument in favor of the claimant that can be made. We cannot believe there would be any hesitation in holding an individual liable who, after making such a contract as was made in this instance, and requesting such alterations for his own benefit, and who, while aware of the increased time necessary, and that the other party was in good faith and with reasonable diligence performing the work, should say, "I will not receive or pay for the work done, because it was not done within the time first stipulated."

There is no reason why the parties should not modify the contract by a change in the character of the weapon and time of delivery; and if it was well known to both that the change in the weapon required a longer time, as the court finds it was, it must be implied that both parties consented to such an extension of time as was necessary or reasonable for the completion of the contract.

The reply to this is, that the United States did not contract for six thousand carbines, but only for so many as could be made and delivered within the six months, and that, notwithstanding the change ordered in their construction, as none were delivered within that time, they were not bound to take any afterwards.

But this is a narrow and incomplete view of the contract. It leaves out the claimant's rights in the matter. The claimant had a right under the original contract to deliver six thousand carbines within six months, and have his pay, if he could make so many within that time. He could have made them all within that time, as found by the court, but for his consent to the request of the government to change for its benefit the structure of the weapon. As before stated, this request implied such an extension of time as was known to be necessitated by that improvement, and the government must be bound by this reasonable intendment as an individual would have been. As it is found substantially that the claimant was ready and offered to deliver within a reasonable time, he is entitled to such damages as he sus-

tained by the refusal of the government to receive and pay for the arms.

What are those damages? It is not found that the weapons had at any time a market value or current selling price. It is not found what they were worth or could have been sold for at the time they were offered for delivery and refused. They were not then or at any time sold or offered for sale by the claimant. The only criterion of damage furnished is the finding of the court, that the six thousand carbines are now (at the time of the judgment of the court) in the possession of the company, and of the value of $3 each.

As the case stands, we REVERSE the judgment of the Court of Claims, and remand the case, with directions to render a judgment for the claimant for such damages as they may ascertain that the claimant has sustained by reason of the refusal of the United States to accept and pay for the six thousand carbines.

SOHN v. WATERSON.

In construing a statute of limitations, it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of contrary provision, to begin when the cause of action is first subjected to its operation.

Hence, when a right of action accrued in 1854 and a statute of limitations passed in 1859 barred all actions of its kind not "commenced within two years next after the cause or right of such action shall have accrued," *held*, that the cause of action began to run from the date of the statute, and that suit might have been brought any time within two years from that date, and, accordingly, that the statute had not summarily cut off existing rights; thus making itself unconstitutional.

ERROR to the Circuit Court for the District of Kansas; the case, as appeared by the pleadings, being thus:

In 1854, one Sohn, a citizen of Ohio, obtained a judgment in one of the courts of the State named against a certain

Argument for the plaintiff in error.

Waterson. Soon after this Waterson went to Kansas, and from 1854 became and remained a citizen of that State.

On the 10th of February, 1859, four years or more after the judgment in Ohio was obtained, the legislature of Kansas passed a statute which enacted:

"That all actions founded on any promissory note, bill of exchange, writing obligatory, bond, contract, judgment, decree, or other legal liability, made, executed, rendered, &c., beyond the limits of this Territory, shall be commenced within two years next after the cause or right of such action shall have accrued, and not after."

This statute being on the statute-book, and Waterson being now, as already mentioned, a citizen of Kansas, Sohn, still a citizen of Ohio, in 1870 sued him in the court below to recover the amount of the judgment which he had obtained against him in Ohio, A.D. 1854.

The defendant pleaded the above-quoted statute of limitations of the State of Kansas, namely, that the action did not accrue within two years next before the commencement of the suit. The plaintiff demurred to this plea, and upon this demurrer judgment was rendered for the defendant.

The court below said:

"As the defendant was a resident of this State when the act of February 10th, 1859, took effect, it is our opinion that the two years' limitation therein provided began to run in favor of the defendant as against the present cause of action from that period, and that this action might have been brought at any time within two years after that act went into operation. Not having been brought within that period it was barred."

Mr. J. B. Sanborn, for the plaintiff in error:

We must interpret the Kansas statute according to what its words say, and infer, as a purpose, what the legislature of the State has in plain terms indicated to be the intent. Thus interpreted the statute attempts to bar summarily an existing right of action. This is within the constitutional inhibition, that "no State shall pass a law impairing the obligation of contracts." A reasonable opportunity must be

afforded to parties to try all rights of action existing when such a law passed.*

The court below sought to give a semi-prospective operation to the act; but if the act is to be interpreted prospectively at all, it must be interpreted so wholly; and this would have the effect of restricting its application to actions accruing after its passage. Such assuredly was not the purpose of the legislature, if we may judge by what it says. The act was meant to operate generally; and so operating, it cannot, as we have said, be sustained as to rights of action existing when it was passed.

Mr. Thomas Ewing, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.

A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held, that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. "Words in a statute," says Justice Paterson, "ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise

* Cooley's Constitutional Limitations, 2d edition, p. 366.

satisfied."* And this rule is repeated by this court in *Harvey* v. *Tyler*,† where it is said: "It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

The plaintiff contends that the application of this rule to the statute in question would have the effect of restricting its application to actions accruing after the passage of the act. But this is not a necessary conclusion.

A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is, to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leav-

* United States v. Heth, 3 Cranch, 413. † 2 Wallace, 347.

ing all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross* v. *Duval** and *Lewis* v. *Lewis*.† In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation non-residents of the State, but this exception had been afterwards repealed; and this court held that the non-resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. "The question is," says C. J. Taney (speaking in the latter of the cases just cited), "from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided." It is true, that in the subsequent case of *Murray* v. *Gibson*,‡ this court followed the decisions of the Supreme Court of Mississippi in its construction of a statute of that State, and held that it applied only to actions accruing after the statute was passed. But that decision was made in express deference to those of the State court, which were regarded as authoritative. In the present case we are not bound by any decisive construction of the State court on this point.

JUDGMENT AFFIRMED.

* 18 Peters, 62. † 7 Howard, 778. ‡ 15 Id. 421.

UNITED STATES v. LAPÈNE.

In February, 1862, while the whole State of Louisiana, including the city of New Orleans, was under the civil and military control of the rebels of the late rebellion, a mercantile firm in New Orleans sent their agent into certain interior parishes of the State to collect money due to the firm and to make purchases of cotton. After the agent had got into the interior parishes, but before he had bought any cotton, the city of New Orleans, where his principals were, was captured (April 27th, 1862), by the forces of the United States, and remained from that time under the control of the government, the interior parishes, however, still remaining in the control of the rebels. Subsequently to this the agent made purchases of cotton from persons in these interior parishes, still, as just said, under the control of the rebels. *Held* that the firm was guilty of trading with the enemy, and that the property was rightly taken by the Federal government.

APPEAL from the Court of Claims; the case being thus:

"On the 20th of February, 1862, while the whole State of Louisiana, *including the city of New Orleans*, was in the possession and under the control of the rebels, Lapène & Ferré, a mercantile firm in the said city, sent their travelling clerk from the said city of New Orleans into certain parishes in the interior of the State, to collect moneys due to the firm there, and gave him authority to purchase sugar and cotton for the firm.

"In March or April, 1862, they requested one Avegno, who was then going from New Orleans to the said parishes, to remit to their said clerk the sum of $5000, and to assist the said clerk in the business of buying sugar and cotton. Avegno agreed to do this; and, in pursuance of his agreement, did deliver the said sum to the said clerk, in the said interior parishes, then in the possession and under the control of the rebels.

"While the said clerk and the said Avegno were in the said parishes, on the 27th day of April, 1862, the city of New Orleans was captured by the United States forces, and thenceforth through the whole term of the rebellion was held by those forces.

"*After* the said capture, the said clerk with the said sum of $5000 and other moneys collected by him in the said parishes, which parishes were, when the purchases were made, in the possession and under the control of the rebels, bought in different lots a quantity of cotton, and left it at the places where it was purchased.

"He returned from those parishes to New Orleans on the 14th of July, 1862. There was no evidence of any communication having been had between him and Lapène & Ferré, in relation to the said purchases of cotton, between the capture of New Orleans and his own return to that city, except the aforesaid delivery to him by Avegno of the said $5000.

"The cotton so purchased remained at the points at which it was purchased until April and May, 1863, when it was captured by military forces of the United States and shipped to and received by the Federal authorities at New Orleans."

Hereupon Lapène & Ferré filed a petition in the Court of Claims, claiming the cotton or the proceeds of it as their property; and the Court of Claims decreed that it belonged to them. From this decree the United States took the present appeal.

Mr. S. F. Phillips, Solicitor-General, for the appellant, relied on *Griswold* v. *Waddington*,* *United States* v. *Grossmayer*,† and *Montgomery* v. *United States*.‡

Mr. W. P. Clarke, contra, sought to distinguish the case from the cases mentioned, and relied on *United States* v. *Anderson*.§

Mr. Justice HUNT delivered the opinion of the court.

All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one in person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify

* 15 Johnson, 57; 16 Id. 438.
† 9 Wallace, 72.
‡ 15 Id. 395.
§ 9 Id. 56.

discussion.* No property passes and no rights are acquired under such contracts.

In March, 1862, the whole of the State of Louisiana was in the military possession of the Confederate forces. Intercourse between the inhabitants of the different portions thereof was legal, and contracts made between them were legal.

On the 27th of April, in the same year, the city of New Orleans was captured by the military forces of the United States, and thereafter remained under their control. From that time commercial intercourse between the inhabitants of that city and the inhabitants of other portions of the State of Louisiana which remained under the Confederate rule became illegal. Ordinarily the line of non-intercourse is the boundary line between the territories of contending nations. The recent war in the United States was a civil war, in which portions of the same nation were engaged in hostile strife with each other. The State of Louisiana, although one of the United States, was under the control of the Confederate government and their armies, and was an enemy's country. While the city of New Orleans was under such control it was a portion of an enemy's country. When that city was captured by the forces of the United States, the line of non-intercourse was changed, and traffic before legal became illegal. This line was that of military occupation or control by the forces of the different governments, and not that of State lines. This principle was expressly decided in *Montgomery* v. *United States*.† There the cotton sold was in the parish of La Fourche, a parish of the State of Louisiana, and belonged to Johnson, an enemy domiciled in an enemy's country, to wit, the parish of La Fourche, in the same State. The sale was made by an agent of Johnson, in the city of New Orleans, to Montgomery, a British subject. This court held the sale to be void and that no title passed to Johnson.

Like that in Montgomery's case, the agency here was cre-

* Woolsey's International Law, § 117; Montgomery v. United States, 15 Wallace, 395.

† *Supra.*

ated while it was legal to create an agency. In each case, also, existed the important fact that the transaction of purchase took place after the parties became residents of hostile portions of the same State. Burridge was appointed the agent of Johnson in Montgomery's case, as was the agreement in this case made with Avegno, and the money advanced by him, while the parties were all residents of and under the control of the Confederate government. But the cotton was sold by Burridge, as here the cotton was purchased by the clerk after this relation had ceased. In each instance the purchase of the cotton was a transaction with an alien enemy.

The agency to purchase cotton was terminated by the hostile position of the parties. The agency to receive payment of debts due to Lapène & Co. may well have continued. But Avegno was no debtor to that firm. He advanced money to their agent when it was legal to do so. With this money, and other moneys belonging to them, while in an enemy's country, the agent of the plaintiffs bought the cotton in question. This purchase gave effectual aid to the enemy by furnishing to them the sinews of war. It was forbidden by the soundest principles of public law. The purchaser obtained no title to the cotton, and has no claim against the government for its capture.

JUDGMENT REVERSED.

Dissenting, Mr. Justice MILLER and Mr. Justice FIELD.

UNITED STATES v. BOUTWELL.

In the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding or on an order for the substitution of parties.

ON MOTION. *Mr. R. W. Corwine*, in behalf of the owners of an order on the Treasury of the United States, had applied

to the Supreme Court of the District of Columbia for a mandamus on the Hon. G. S. Boutwell, then Secretary of the Treasury, to pay it. That court refused the mandamus, and the case was brought, on error, by the relators here. After it had got into this court, Mr. Boutwell resigned his place of Secretary and the Hon. W. A. Richardson was appointed to it. Hereupon Mr. Corwine moved for leave to bring in and substitute Mr. Richardson on the record as defendant in the place of Mr. Boutwell. It did not appear that any application had been made to Mr. Richardson as Secretary to pay the draft. Mr. Richardson, by his counsel, opposed the motion.

Messrs. R. M. and Q. Corwine, in support of the motion:

We assume, for the purpose of our argument, that the claim of the relators is a just one, and that the order on the treasury held by them ought to be paid. That in such a case they ought to certainly have the assistance of the courts cannot be denied. But how, practically, can they certainly have it if they cannot have the substitution asked for? and if, on the contrary, the right to any writ has abated by the resignation of Mr. Boutwell? Rarely does any officer of the Cabinet long remain in office. In that department which specially concerns this court, for example, since 1864—that is to say, in nine years—seven attorneys-general have been in and out of these precincts. If a claimant on the treasury must proceed *de novo* against each successive secretary he will rarely see the end of his suit, for a secretary rarely remains in office for as long a time as in the "law's delay" a suit is pending. Such a doctrine, therefore, as is contended for on the other side is a practical denial of justice.

But why should such a doctrine prevail? We seek relief not against Mr. Boutwell, but against the Secretary of the Treasury of the United States. Until he comes into place, Mr. Boutwell is as nothing to us, and he is as nothing to us from the moment that he leaves place. The person is nothing; the place or office everything. The obligation on which we rely arises from the acceptance of an *office*, which has im-

posed a duty on its incumbent. Why, then, when one secretary departs shall not the new one be substituted for him? *The Sapphire*,* in this court, seems in point. There a libel had been filed by the then Emperor of the French, Napoleon III, against the Sapphire, an American vessel, for injuries done to the French ship Euryale. Before the cause came to be heard Napoleon III was deposed. And one question was whether the suit had not abated. The counsel for the respondents argued that the Euryale was a vessel of the French government, with which Napoleon had "nothing whatever now to do, being banished and a fugitive." But this court said:

"The reigning emperor, or national assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced, and receive the fruits of it.

"If a substitution of names is necessary or proper, it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding."

Mandamus is in the nature of a suit at common law. After institution, its conduct and management are governed by the pleadings and practice which pertain to like suits, whether in the Circuit or in the Supreme Court, on writ of error. All such amendments as can be made in suits at law may be made in suits of mandamus. The strict rules appertaining to the old writ of right, as this writ was once called, have no longer any application in this country. New parties, plaintiff or defendant, may be made upon a proper case. The death of either party does not necessarily abate the suit. Upon a proper case, orders for the substitution of parties will be made *as a matter of course*.†

If this were a proceeding against Mr. Boutwell individu-

* 11 Wallace, 168.

† Maddox v. Graham, 2 Metcalfe, 56; Hollister & Smith v. The Judges, &c., 8 Ohio State, 201.

ally, and he were dead, there could be no question of our right to bring in his representatives under this rule.

Mr. C. H. Hill, contra.

Mr. Justice STRONG delivered the opinion of the court.

The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred.* Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant.

It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the con-

* Tapping on Mandamus, 283.

trary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it. On the contrary, after the statute of 9th Anne, chapter 20, sec. 1, it was the acknowledged doctrine in England, that the rules and practice as to abatement by death, resignation, or removal from office, were the same in cases of mandamus as in personal actions. By that statute, it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue, or demur, and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his action on the case for a false return. Thus mandamus became in effect a personal action against the defendant.* This statute was in force in Maryland when the District of Columbia was a part of that State, and hence it is in force in the District now. Therefore, whatever may be the rule elsewhere, *here* a writ of mandamus must abate whenever the performance by the defendant of the personal duty it seeks to enforce has become impossible.

The law was changed to some extent in England, by the later act of Parliament of 1 William IV, chapter 21, sec. 5, by which it was enacted that in case the return to any writ (of mandamus) within the purview of the act should, in pursuance of an allowance made by it, be expressed to be made on behalf of any other person than the defendant, the further proceedings on such writ should not abate or be discon-

* See Chitty's General Practice, 3d ed., 1406–1409.

tinued by death, resignation, or removal from office of the person who made such return, but the same might be continued and carried on in the name of such person, and if a peremptory writ should be awarded, it might be directed to any successor of such person in office or right. No similar statute exists with us, and its enactment in England was a recognition of the rule that the death, resignation, or removal from office of the defendant, worked an abatement of the action. It required a statute to change the rule, and to avoid injustice, the costs of the writ, when issued and obeyed, were committed to the discretion of the court.

And, even if the retirement of the defendant from office and his consequent inability to perform the act demanded to be done does not abate the writ, or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case.* But any summons issued, or rule upon Mr. Richardson requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor.

MOTION DENIED.

NOTE.

The preceding case, in its principal form, being subsequently reached in the regular call of the docket, the court decided that the suit having abated must be dismissed; Mr. Justice CLIFFORD, who announced this judgment, referring to the opinion just above given, as showing the abatement of the suit by the resignation of Mr. Boutwell and by the appointment of his successor, and referring to that opinion and to the case of *The Secretary* v. *McGarrahan*,† as all that was necessary to support the conclusion to which the court had come in thus finally disposing of the case.

* Marbury v. Madison, 1 Cranch, 137; Kendall v. United States, 12 Peters, 526.

† 9 Wallace, 813.

SAWYER v. HOAG, ASSIGNEE.

1. Capital stock or shares of a corporation—especially the unpaid subscriptions to such stock or shares—constitute a trust fund for the benefit of the general creditors of the corporation.
2. This trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith.
3. An arrangement by which the stock is nominally paid, and the money immediately taken back as a loan to the stockholder, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholder.
4. The twentieth section of the Bankrupt Act was not intended to enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized.
5. A stockholder indebted to an insolvent corporation for unpaid shares cannot set-off against this trust fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors.
6. The relations of a stockholder to the corporation, and to the public who deal with the latter, are such as to require good faith and fair dealing in every transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be made into all such transactions in the interest of creditors.

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus:

About the 1st of April, 1865, and prior, therefore, to the passage of the Bankrupt Act of 1867, the directors of the Lumberman's Insurance Company of Chicago—a company then recently incorporated and authorized to begin business on a capital of $100,000, of which not less than one-tenth should be paid in, the residue to be secured—invited subscriptions to the capital stock of the company; stating, in most instances, to those whom they invited to subscribe, that only 15 per cent. would be required to be paid down in cash, and that the remaining 85 per cent. would be lent back to the subscriber, and a note taken therefor, payable in five years, with 7 per cent. interest, payable semi-annually, se-

cured by collateral security satisfactory to the directors of the company.

In this state of things one Sawyer, about the said 1st of April, 1865, at the solicitation of one of the directors, subscribed for fifty shares of stock. When called upon to close his subscription, he was informed, as indeed all the subscribers were, that the matter would be closed on the plan above mentioned.

Sawyer accordingly complied with the requirements, and gave his check to the company for $5000, the full amount of his stock, and his note payable to it in five years from date, for $4250, that is to say, for 85 per cent. of the par value of the stock, with interest, payable as aforesaid, and delivered to the company as collateral security for the payment of his note satisfactory securities, and received from the company a check for $4250 or 85 per cent. of the par value of the stock, by way of, and as for a loan thereof from the company. At the same time Sawyer gave a written authority to the company to sell the securities at public auction, for cash, in case default should be made in the payment of the note and the interest thereon.

Sawyer subsequently took up this note and gave in substitution therefor another note, and new securities as collateral, with power, as in the case of the former ones, to sell them on default of payment of the note or interest.

At the time when the said original and substituted notes were made, money was worth and could have been lent in Chicago at from 8 to 10 per cent. interest per annum, payable semi-annually, on good security.

The original transaction was regarded and treated by the company and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the original note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

On the 8th and 9th day of October, A.D. 1871, a great fire devastated the city of Chicago and rendered the Lumberman's Insurance Company insolvent; and on the 25th of

January, 1872—it being at that time a notorious fact, one well understood by the public, and one which Sawyer had good reason to believe, that the said company was insolvent and unable to pay its liabilities—Sawyer purchased of a certain Hayes a certificate of an adjusted loss for $5000 against the company for 33 per cent. of its par value.

In June, 1872, after Sawyer had purchased this certificate of adjusted loss, a petition in bankruptcy was filed against the company, and it having been adjudicated a bankrupt, one Hoag was appointed its assignee.

The thirteenth section of the Bankrupt Act enacts "that after the adjudication in bankruptcy the creditors shall choose one or more assignees of the debtor." And the fourteenth section, under the marginal head of, "What is to be vested in the assignee by the adjudication of bankruptcy," &c., enacts that—

"All the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action . . . all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate . . . and for any cause of action which the bankrupt had against any person . . . with the like right, title, power, and authority to sell, manage, dispose of, sue for and recover the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee: and he may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law and equity, . . . *in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt.*"

The fifteenth section of the act enacts:

"That the assignee shall demand and receive from any and all persons holding the same all the estate assigned or intended to be assigned under the provisions of this act."

The sixteenth section enacts:

"That the assignee shall have the like remedy to recover all said estate, debts and effects, in his own name, as the debtor

might have had if the decree in bankruptcy had not been rendered and no assignment had been made."

Among the effects of the company, which came into Hoag's hands as assignee, was the already-mentioned note of Sawyer for $4250, with the securities assigned as collateral. Hoag demanding of Sawyer payment of this note, Sawyer produced his certificate of adjusted loss for $5000 and insisted on setting it off against the demand; asserting a right to do this under the twentieth section of the Bankrupt Act, a section in these words:

"In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate:

"*Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the power given to him. Hereupon Sawyer filed a bill in the court below to enforce the set-off; in which he alleged, among other things, that the note given by him to the insurance company was for money lent to him.

The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription, which had never been paid, and insisted that such balances constituted a trust fund for the benefit of all creditors of the insolvent corporation, which could not be made the subject of a set-off against an ordinary debt due by the company to one of its creditors. After the general replication, the case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, and from that decree the case was brought by the present appeal to this court.

Messrs. D. L. Storey and C. Hitchcock, for the appellant:

1. Sawyer had a right to purchase an adjusted and nego-

tiable claim against the insurance company at a discount, and to set it off against his debt, notwithstanding that he knew that the company was insolvent at the time he purchased the claim.

Under the twentieth section of the Bankrupt Act, in cases of mutual debts or credits between the parties, an account is to be stated and the balance is to be allowed or paid. Two conditions only are required: 1st. That the claim to be set-off shall be in its nature provable against the estate. 2d. That such claim shall have been purchased by or transferred to the debtor before the filing of the petition. Sawyer was within both conditions. The claim was a provable claim, and it was purchased and transferred to the debtor nearly five months before the filing of the petition in bankruptcy.

2. The assignee in bankruptcy has no greater or other right than the bankrupt would have had if there had been no proceedings in bankruptcy.

Under the fourteenth section of the Bankrupt Act rights of action of the bankrupt vest in the assignee, who may prosecute the same, "in the same manner and with like effect" as they might have been prosecuted by the bankrupt. Hoag as assignee was the representative of the insurance company, and can assert no right which it could not have asserted.*

"I have always understood," said Lord Eldon, "that the assignment from the commissioners, like any other assignment, by operation of law, passed the rights of the bankrupt precisely in the same plight and condition as he possessed them."†

Sawyer has held his claim under the certificate of loss since the 25th of January, 1872. We have seen that if the insurance company had sued him on the note it held against him, at any time prior to the filing of the petition in bankruptcy, June 20th, 1872, his defence in set-off would have been perfect, whether sued in a court of law or a court of equity. It is impossible to conceive, on the case stated, any

* See Bemis v. Smith, 10 Metcalf, 194.

† Mitford v. Mitford, 9 Vesey, 100; 2 Smith's Leading Cases, 870.

defence which the company could have interposed. If it is argued that the assignee has some other and higher right than the bankrupt would have had, it is incumbent on those who thus argue to show upon what statute, upon what authority, or upon what legal principle the distinction in favor of the assignee is supported.

Mr. J. N. Jewett, contra, for the appellee:

1. By the insolvency of the company its obligations were worth only thirty-three cents upon the dollar, and at this rate the claim sought to be set off was purchased by the appellant. If it is allowed to be set off in full he pays his own debt of $4250 with $1402.50. The insolvency, therefore, of his creditor lessens the assets to go to the general creditors by $4250, at a cost to him of less than one-third of the amount due upon his note. Surely a construction will not be given to the Bankrupt law resulting in such injustice and inequality to the creditors. It would make the Bankrupt law an instrument of fraud, instead of equal justice to all, and subvert the fundamental principles of its enactment. It must also be observed that this advantage over the other creditors would, in this case, result to a *stockholder*, and upon an obligation given in fact or effect, for his subscription for stock in the corporation. If the right of set-off as contended for by the appellant is sustained, then the directors and stockholders of an incorporated company may, in anticipation of insolvency and bankruptcy, borrow the whole or a large part of the cash assets of the company, proclaim its insolvency, depreciate its credits, and buy them up at a discount, and thus absorb the capital of the company to the exclusion of the general creditors. Justice would require that if losses are to be sustained, the stockholders, who have received the profits, should be the losers rather than the general creditors. At all events, they should not be allowed to become preferred creditors to the detriment of general creditors.

We submit, as a matter for inquiry, whether after insolvency a *mutual* debt or credit can be created between the insolvent and a third person, within the meaning of the

Bankrupt law, by a purchase of a claim against the insolvent without his knowledge or assent? Certainly *mutual* debts and credits must result from mutual and reciprocal dealings one with the other. How, then, can the purchase of a demand against a party, without his knowledge or consent, be held a mutual debt?

2. It is not true that the relative rights of parties are not changed by the bankrupt proceedings against one of them. They are changed by both *insolvency* and bankruptcy. The Bankrupt law makes any payment, sale, assignment, transfer, conveyance, or other disposition of property, by any person *insolvent* to any person who has reasonable cause to believe such person *insolvent*, within six months before the filing of a petition in bankruptcy, void, and the assignee may recover the property or value of the assets; or if such sale, assignment, &c., were not made in the usual course of business, the fact is *primâ facie* evidence of fraud. Such a transfer, but for the bankruptcy, could not be set aside or divested of its legal effect at the option of the party making it. If the claim set up by the appellant, however, was obtained in a manner and under circumstances within the spirit of the prohibition of the Bankrupt law, or subversive of its intent, the assignee may deny the right of set-off, which could not be done as against the debtor himself.

3. A set-off cannot be allowed in this case:

1st. Because the appellant was a stockholder in the Lumberman's Insurance Company at the time he purchased the claim against it.

2d. Because his note was given in part payment towards his stock subscription.

A stockholder sustains to the company in which he holds stock a relation which one who is not a stockholder does not hold; a different relation. The stockholder has the means of acquiring a knowledge of the company's affairs and condition not possessed by the other; a direct interest in its profits and losses; and stands in such a relation to the company and its other creditors, as ought to debar him, at all events, of the right to pay off his debt to the company

by the purchase and set-off of depreciated claims against it to the injury of other creditors. The note on which the assignee here claims payment is, in substance and effect, a stock note given for and existing as a part of the stock fund for the security of parties dealing with the company.

That the stock and assets of an incorporated company *are a trust fund*, for the security of its creditors, which may be followed by them into the hands of any person having notice of the trust, is an established principle, and is fully discussed and declared in many cases.*

No devices will be permitted, no shift allowed, however artfully planned and executed, to avoid the actual and *bonâ fide* payment of the stock of an incorporated company, for the creation of a fund for the security of those dealing with it. And the question, therefore, is whether this transaction was such an actual *bonâ fide* payment of his stock in full as divests the note given by the appellant of the character of a stock note, legally or equitably liable to be treated as security for the obligations of the company?

The transaction was consummated in conformity with the terms proposed when the subscription was made. Though he was required to and did give his check for the full amount of the stock, it was with the understanding that 85 per cent. of what he paid would be returned to him on the terms upon which his subscription was originally procured. The giving of a check in the first instance, for the whole amount, was but a contrivance to disguise the real transaction and its intent. It was the payment in of money with one hand and taking it out with the other. It was no absolute, unconditional payment, and was never designed to be so as to 85 per cent. These companies, when the stock is actually paid up, and they are honestly administered, are sufficiently insecure without the sanction of devices by which the fund

* Curran v. Arkansas, 15 Howard, 304; Wood v. Dummer, 3 Mason, 308; Lawrence v. Nelson, 21 New York, 158; Scammon v. Kimball, 6 Chicago Legal News. 3; Nathan v. Whitlock, 3 Edwards's Chancery, 215; McLaren v. Pennington, 1 Paige, 108; Long v. Penn Insurance Company, 6 Pennsylvania State, 421.

required by the law to be created and set apart as security to those dealing with them, can be wholly retained by the stockholders or passed back into their hands.

It is no answer to say that in this case the securities pledged for the payment of the note were ample. To allow it in any case would be opening a door for the evasion of payment of the stock, which dishonest men would be ready to take advantage of by the pledge in similar cases of worthless securities.

4. It is assumed that because the original transaction was regarded and treated *by the company* and *the complainant* as a loan to the latter, and his stock treated and regarded as paid, therefore neither the assignee nor any creditor can controvert the fact. But because it was so treated by the parties does not make it so as to third persons, assignee or creditors. When they dispute the *bona fides* of the loan courts will look into the facts and determine whether it was a real or a colorable loan.

The fact that the company reported to the State authorities the full payment of the stock, goes for nothing more than that it was able to deceive the State officers as well as the public into the belief that the stock was fully paid, when the stockholders had only paid in the money with one hand and taken it out with the other, and had done so in pursuance of a previous concurrent agreement.

Mr. Justice MILLER delivered the opinion of the court.

The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of $100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to

the company his check for the full amount of his subscription, namely, $5000. He took the check of the company for $4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed

by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely, *Burke* v. *Smith*,* and in *New Albany* v. *Burke*.† Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad company, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent,

* 16 Wallace, 390. † 11 Id. 96.

that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.*

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organ-

* See also Curran v. State of Arkansas, 15 Howard, 304; Wood v. Dummer, 3 Mason, 305; Slee v. Bloom, 19 Johnson, 456, and numerous other cases cited by the counsel for the appellees.

ized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.*

* Lawrence v. Nelson, 21 New York, 158.

These principles require the affirmation of the decree in the present case, and it is accordingly

AFFIRMED.

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.

NOTE.

At the same time with the preceding case were submitted and adjudged two other cases, *Meyer* v. *Vocke, Assignee*, and *Jaeger* v. *Same Defendant*, both from the same court as the preceding case, which though differing, both, in some respects,—the latter case especially, which was a suit at law,—from the one just above reported, were declared by the court to fall within the same governing principles. In both cases the decision below had been in favor of the assignee in bankruptcy, and in both it was accordingly affirmed in this court.

KIBBE v. BENSON.

1. Under a statute which requires that in actions of ejectment where the premises are actually occupied, the declaration shall be served by delivering a copy thereof . . . to the defendant named therein, who shall be in the occupancy of the premises, or if he be absent by leaving the same with some white person of the family, of the age of ten years or upwards, "*at* the dwelling-house of such defendant;" a leaving of the declaration with such a white person of the family when he is at a distance of one hundred and twenty-five feet from the house and in a corner of the yard of the house, is not a compliance with the requirement of the statute.
2. Judgment obtained by default, on such a service, the defendant not having had actual notice of what was done, and averring a good title in himself, set aside on bill in equity.

APPEAL from the Circuit Court for the Southern District of Illinois; the case being thus:

A statute of Illinois, relating to actions of ejectment, adopted by the Federal court sitting in the Illinois district,

makes the following provision relative to the service of the writ:

"If the premises are actually occupied the declaration shall be served by delivering a copy thereof with the notice above prescribed to the defendant named therein, who shall be in the occupancy thereof, or by leaving the same with some white person of the family, of the age of ten years or upwards, at the dwelling-house of such defendant, if he be absent."*

This statute and this provision of it being in force, one Kibbe brought ejectment in the court below at January Term, 1867, against a certain Pleasant Benson, to recover possession of a tract of land in Illinois, containing eighty acres upon which there was a dwelling-house in which Benson with his family lived. A declaration was filed by the plaintiff, and to it was appended an affidavit made by one Turner, not the marshal or then an officer of justice, though an agent of Kibbe, that on a day specified he, Turner, had served the declaration and the usual notice to plead by delivering a copy to John Benson, the father of the defendant in the case, and a member of his family, *at the dwelling-house of the said defendant.*

No plea being put in, judgment was entered by default at June Term, 1867, but no immediate steps were taken to enforce the judgment. In September, 1869, a writ of possession was issued on the judgment, and Benson was about to be turned out.

Hereupon he filed a bill in the court below against Kibbe, to set aside the judgment entered as above mentioned.

The bill, averring a good and perfect title to the land in the complainant, set forth the facts above stated, but denied that the declaration was served on the father, as sworn to in the affidavit filed with the declaration, or that it was delivered at the complainant's dwelling-house to any member of the complainant's family. It averred, in addition, that the complainant was ignorant of the commencement or existence of such suit until September, 1869, when a deputy

* Gross's Statutes, edition of 1868, p. 245.

marshal appeared at his house demanding possession of the land on which he was living, by virtue of an execution issued upon the said judgment; that the complainant was not informed of the existence of the judgment until more than two years had elapsed from its recovery, within which time he would have been entitled under the statutes of Illinois to move to set it aside.

The answer of Kibbe denied the material allegations of the bill, averred that the declaration *was* delivered to Benson, the father, who was then and there informed of the contents of the paper delivered to him and had full notice of its purpose and object, and it denied specifically that the writ of possession was withheld for the term of two years.

One principal question, therefore—a question preliminary to any one of law—was a question of fact; in what manner, if in any, had the declaration been served?

On this point the testimony of Turner, who made the original affidavit, and of one Paullin, who was with him when he made whatever service he did make, were given in support of the service; and the testimony of John Benson, the father (to whom Turner alleged that he had given the declaration), and of Pleasant Benson, the now complainant, were given against it.

Turner testified that on the 13th of September, 1866, he went to the dwelling-house of Benson for the purpose of serving him with the declaration, that he knocked at the front door of the house, inquired for Mr. Benson, was told by the person opening the door that he was away from home, and as Turner testified that he thought he was informed, absent in Missouri; that afterwards on the same day, in the presence of Paullin, he had a conversation with John Benson, the father, and told him that he had come to make service of the declaration, unless some compromise should be made; that while Benson was standing near the southeast corner of the yard, adjoining the dwelling-house and inside of the yard, *and not over one hundred and twenty-five feet from the dwelling-house*, he handed to him a copy of the declaration, explaining its nature and character, reading to

him the whole of the notice therein, and requesting him to hand the same to his son, Pleasant Benson; that the said John took the same, and after taking it into his hands threw it upon the ground, muttering some angry words.

Paullin testified substantially to the same thing.

Each of these witnesses was subjected to a rigorous cross-examination.

On the other hand, John Benson testified that no paper was read to him or received by him on the 13th of September, 1866; *that at a point from about one hundred and fifty to one hundred and eighty rods from the house, and not within the inclosure*, a paper was offered to him, which he utterly refused to take and did not take.

Pleasant Benson testified that he had no notice or knowledge, in any form, of the declaration or of its service; that his father did not show him, deliver to him, or inform him that a declaration or any other paper had been served upon him in relation to the land.

The Circuit Court decided that the judgment at law should be vacated and set aside, the cause reinstated upon the docket, and be tried in the same manner as though no former trial had been had therein. It was from this decree that the present appeal was taken.

No counsel appeared for the appellant; Mr. H. S. Greene, for the appellee.

Mr. Justice HUNT delivered the opinion of the court.

The cases in which equity will interfere to relieve against a judgment at law, are reasonably well settled.

1st. It will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant was ignorant of the fact creating such equity pending the trial, or it could not have been received as a defence.*

2d. If the party could have defended the suit, but allowed judgment to go by his own neglect, he cannot have relief

* Lansing v. Eddy, 1 Johnson's Chancery, 49; Barker v. Elkins, Ib. 465; Norton v. Woods, 22 Wendell, 520.

in equity for a matter which he might have availed himself of at law.*

3d. If there be a defence, but the party could not avail himself of it in the suit at law, by reason of fraud or accident, equity will relieve against the judgment at law. The rule is well expressed by C. J. Marshall in the *Marine Insurance Company* v. *Hodgson:*† "Without attempting (he says) to draw any precise line to which equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The question of jurisdiction in the present case is identical with the question of the merits. If the party has established the facts on which he relies to sustain his action, he comes within the rules giving relief in equity against judgments at law. If he is not one of the class entitled to such relief, he has no standing in a court of equity. A determination of the allegations of fact upon which the jurisdiction rests, will, therefore, determine the entire case.

The most important fact in dispute concerns the service of the declaration upon John Benson, the father of the original defendant, and the manner and place of such service.

Turner testifies that the service was made at a point not exceeding one hundred and twenty-five feet from the dwelling-house, but does not assert that it was within any of the adjoining buildings or out-houses; and if within what is familiarly called the door-yard of the establishment, it was at a remote corner of the yard. Benson, the father, locates the scene at a point one hundred and fifty to one hundred

* Hewlett v. Hewlett, 4 Edward's Chancery, 7; Floyd v. Jayne, 6 Johnson's Chancery, 479; Graham v. Stagg, 2 Paige, 321.

† 7 Cranch, 336.

and eighty rods distant from the dwelling-house. No one would contend that a service at this last point could with propriety be called a service at the dwelling-house.

Some latitude was, no doubt, intended to be given by this statute. It is not required that the paper shall be delivered to a person who is in the house at the time of such delivery. It may be delivered to one who is at the dwelling-house merely. This expresses the idea of nearness of place, and is less definite than if it had been said, in the house or on the house. To say that one is at home, may mean that he is in the town or city of his residence, or it may mean that he is upon his grounds or in his house.

The intended effect of this expression is illustrated by the other portion of the provision, which forbids (by implication) the delivery of the paper to one who is not of the age of ten years or upwards. If delivered to a young child, there would not be that probability of its delivery to the defendant in the suit, which might be expected if it was left with one understanding the necessity of its delivery to the person for whom it was intended. Both the person upon whom, and the place where, service may thus be made, are intended to secure a delivery to the party interested. It is not unreasonable to require that it should be delivered on the steps or on a portico, or in some out-house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of one hundred and twenty-five feet and in a corner of the yard is not a compliance with this requirement.

The case falls within the scope of the authorities in which relief is given against a judgment. When Turner made affidavit that he served the declaration, by delivering the same to John Benson, at the dwelling-house of his son, he erred either as to the law or the fact. If he did not deliver the paper to Benson at all, he was wrong in his statement of fact. If he did deliver it, he was wrong in his conclusion that he delivered it at the dwelling-house of his son. A judgment has been entered where the service was insuffi-

cient, and the defendant has had no opportunity to defend his estate. It is not necessary to decide upon the conflicting evidence. It is a case, where, either by fraud or by accident, or by mistake, without fault on his part, the defendant has been deprived of the opportunity to make his defence, and within the rule laid down by C. J. Marshall, the judgment must be set aside, and an opportunity afforded to test the question in a court of law.

JUDGMENT AFFIRMED.

SMITHS *v.* SHOEMAKER.

1. In an action of ejectment, a letter of the plaintiff's grantor, written to the ancestor of the defendant, is not competent evidence to show that the ancestor entered into possession under the license of the plaintiff's grantor, without some evidence that such letter was received or acted on about the time of such entry by the ancestor.
2. A general objection that such letter is a declaration of the grantor of his own rights was sufficient.
3. If, in the appellate court, the party introducing such a letter relies on any special circumstances as an exception to the rule (as that it was part of the *res gestæ*), that circumstance must appear in the bill of exceptions or by the record in some other manner. The admission will be held to be erroneous unless this appears.
4. There being no extrinsic evidence that the letter was ever received or acted on by the ancestor, the date found in the letter, though near the time of entry, is not sufficient evidence of that fact to justify its admission. The important fact being its receipt by the defendant's ancestor, at a particular time, cannot be established by the date found in the letter for the purpose of admitting the letter. The date would thus prove the letter, and the letter prove the date, without evidence that either was true.
5. When it is argued here that an error in the court below worked no injury to the party complaining, the fact that it worked no injury must be made to appear beyond question. If it is only to be seen by a mere preponderance of evidence, and the error is substantiated, the judgment must be reversed.

ERROR to the Supreme Court of the District of Columbia.

David Shoemaker brought ejectment, in December, 1868, against Caroline Smith, Mary Smith, *et al.*, for certain real

estate in Georgetown, D. C. The property in question had been conveyed, A.D. 1810, by persons owning it, to one Beal, in trust for a certain Kilty Smith during life, and on his death for his son John Chandler Smith. After the date of this deed, Kilty Smith had another son, to wit, Hamilton Smith, the father of the defendants. On the trial, the plaintiff, Shoemaker, having shown title in the above-named John Chandler Smith, completed his title by showing a conveyance from the said John Chandler Smith to himself, dated June 20th, 1868.

The bill of exceptions now thus stated the case as made by the defendants:

"The defendants, then, to maintain the issues upon their part introduced parol evidence, tending to show that Hamilton Smith . . . entered into the possession of the premises in controversy in the year 1845, with his family, claiming title thereto through a parol gift of the property from his father, John Kilty Smith; that he continued to reside thereon with his family until his death in 1857; that his children, the present defendants, Caroline and Mary, were born upon the said premises; . . . that Caroline was born in December, 1845, and Mary in October, 1847; that the said Hamilton during such occupancy always claimed to own the said premises as aforesaid; that after his death his children continued in the uninterrupted possession thereof continuously, claiming the absolute ownership of said property as heirs-at-law and representatives of their deceased father, which possession was by residence, use, and occupation, and with fixed inclosures, from the entry of the said Hamilton, in 1845, till the present time."

The plaintiff then, *without giving any account of when it was written, or where it had come from, or how he came possessed of the letter*, in order to show that the possession of the defendants was not adverse to the title of John Chandler Smith, but was held under him, and was by license or permission from him, offered in evidence a letter thus:

"BALTIMORE, September 10th, 1845.

"DEAR BROTHER: I have just received father's letter, dated 26th August, sent to me by you. He is well, and across the

lake with his friend, Mr. Montgomery. My health is better. I hope by strict diet and moderate exercise to recover in time. I am still at uncle's, as they insist upon my staying with them, where I am very comfortable, with good society; and I go out a visiting almost every evening with my two cousins. *As regards the advertisement for the rent of the house, there is no necessity for it, as I have determined to place you and your family there, as it will be the very best plan, and you will be better satisfied; so you may take possession as soon as Mr. Bagby leaves it.* There is nothing new here whatever. I have just written to father. We are all well here. I wish you to write to me. Give my love to Ellen and all.

"Your affectionate brother,

"JOHN CHANDLER SMITH.

"To HAMILTON SMITH,
Georgetown, D. C."

The defendant objected to the reception of the letter in evidence.

"1st. Because the plaintiff could not introduce his own declarations, statements, or letter, or the declarations, statements, or letter of those under whom he claims title, to show under whom the defendants or their ancestor went into possession of the property.

"2d. Because the letter was not admissible in evidence for any purpose whatever.

"3d. Because there was no evidence to show that it was in response to any letter written by Hamilton Smith, or that Hamilton Smith ever replied to it.

"4th. Because it was not responsive to the defendant's testimony-in-chief, and was not admissible as a part of the *res gestæ*.

"5th. Because it was not competent or admissible to prove any of the issues raised by the pleading or evidence.

"6th. Because there was no evidence to show that Hamilton Smith acted upon any instructions or suggestions contained in it.

"7th. Because it was irrelevant, inadmissible, and not proper proof."

The court, however, under exception, admitted the letter in evidence for the purpose for which it was offered.

The plaintiff then offered two letters from Hamilton Smith to John Chandler Smith, which, were received without objection. They were thus:

"GEORGETOWN, March 5th, 1856.

"DEAR BROTHER I should like you to sent me the money you promest me in the first of this month Dear Brother I have been very unhappy since you left hear *thinking about leaveing my old home* where I have lived so long *I hope you will change your mind* and *make it* over to me as you and Father has made me menny faithful promises of its being mine and my childrens and now to think that I am to bea turned out of it and to seak shelter somewhere else I have looked forward to bea made happy but now my prospecks are blasted I have had but little pleasures in this world and expeck to *have lest if you ever part from this property I hope you will let me have the refusal of it* I am not calculated to do enny bisiness *and are to depend on your generosity and kindness* for Gord knows I miss Father very much It ought to have been me that Died in place of Father for he could do buisness I am fit for nothing on the face of the earth but a begar I hope you will let me hear from you soon all joine with me in love to you and all I remine your affectionate Brother

"HAMILTON SMITH."

"GEORGETOWN, March 11th, 1856.

"DEAR BROTHER I received your letter of the 6 of this month and we were pleased to heare from you *I am very sorry that my letter distressed you* I should not have wrote to you about the house, but as *you said you did not think you would give me this house* and as you *went to see Brook Williams the night you stayed here I thought he might want you to sell this place to him I am thankful to you to here you say that I may live here as long as I think proper If I have said or done enny thing rong to you to keep me from giveing me this House I am sorry for it and hope you will forgive me* . . . It grieves me to think that I have not a noughf to live on without going in det but I am thankful to God for what I have and hope he will wach over us and proteck us as he dus the foules of the are *I am thankful to you for what you have done for me and never shall forget you for your kindness to me* you say you will send me one hundred Dollars this month and if I take that to pay my bills with I shall have nothing to live on I

hope you will try and help us so as I shall not have to brake up the house as it would brake my heart to leave hear and and to leave the one I love I pray God that evry think may go write with me Write soon

"I remain your affectionate Brother

"HAMILTON SMITH."

The defendants then introduced evidence tending to prove that Hamilton Smith was a man of infirm capacity for business, of a nervous temperament, and easily frightened, and dependent upon others for the transaction of any important business; that in his lifetime he paid the taxes on the property, the receipts for which, with other papers, were taken by John Chandler Smith; that he handed over to the said John, to take care of and receive the interest on, bonds to the amount of $20,000, which his father had given to him.

The court having charged the jury (among numerous other things), that twenty years of open, notorious, visible, continuous possession of inclosed property, under claim of title, against all the world, would, of itself, as a general rule, amount to a valid title; yet, that if the defendants had obtained their possession in subservience to or under the plaintiff, they would not be allowed afterwards to set up a claim to the property by means of their possession, and the jury having found for the plaintiff, and judgment having been entered accordingly, the case was now here on exception to the admission of the letter purporting to have been written September 10th, 1845, and given *supra*, on page 631. Errors were assigned to the charge of the court, but no exception had been taken to it.

Messrs. W. D. Davidge and R. B. Washington, for the plaintiff in error:

There is no evidence whatever to show when the letter which purports to have been dated "September 10th, 1845," was written, or that it was ever received by Hamilton Smith. The statements made in the letter are then mere hearsay evidence, and have no more efficacy than if they had been

made by parol to a third person having no privity with the defendants or those under whom they claim.* The effect of its admission was simply to mislead the jury, and when taken in connection with the instruction, that "if the defendants have obtained their possession in subservience to, or under the plaintiff, they are not allowed afterwards to set up a claim to the property by means of their possession," was conclusive of the whole case against the defendants.

Mr. R. T. Merrick, contra:

The defendant objected below to the reception of the letter for seven different reasons, all specific in character. No one of these reasons is the one now urged before the court, to wit, in effect that the letter was not written at the time when it bears date, and that it was not received by Hamilton Smith. Is not the objection which was actually taken, to wit, that "there was nothing to show the letter was *in response* to any letter written by Hamilton Smith, or that Hamilton Smith ever *replied* to it" an implied admission that he had *received* it. Would any such specific, acute, far-fetched, and not very satisfactory objections as those two have been made, if it had been possible to make with truth the one natural and conclusive objection, that no such letter had ever been really written in 1845 to Hamilton Smith, or at least that he had never received any such letter? an objection which would have rendered both these two reasons and indeed all the others—no one of the whole seven being sound *even* if the letter had been inadmissible—superfluous.

Suppose that I claim a house as owner. Years afterwards the man claims the property by right of adverse possession. I say to him, "Why, I wrote to you years ago a letter under which you went in as my tenant." What, if the man never got my letter, would be the natural and simple answer? "Sir, I never received any such letter." And if, instead of

* Wright *v.* Doe, 7 Adolphus & Ellis, 313; McNamara *v.* Gibbs, 1 Carrington & Marshman, 412; Sturge *v.* Buchanan, 2 Moody & Robinson, 90; Richards *v.* Frankum, 9 Carrington & Payne, 221; Fairlie *v.* Denton, 8 Id. 102; Towle *v.* Stevenson, 1 Johnson's Cases, 110.

saying that, he were to say, "That letter was not in response to anything I wrote to you," and "I never replied to that letter," would he not make a clear though implied admission that he had received the letter? Independently of this, it being necessary that the court should satisfy itself of any fact on which the admissibility of the letter depended,* it is to be presumed that proof of such necessary fact was made to the judge trying the case.

The letter being thus proved to have been received, the date of the letter, September 10th, 1845, is *primâ facie* evidence of the time when it was written.† Moreover, the letter is part of the *res gestæ* under which Hamilton Smith obtained his possession.

Finally, if it was error in the court to admit the letter, it was not such an error as will warrant a reversal in this case; because the admissions of Hamilton Smith, in his letters of 1856 (*supra*, pages 633, 634), to the effect that he held under and by permission of John Chandler Smith, was conclusive against the adversary character of the possession set up as the defence against the admitted record title, and required the jury to find for the plaintiff.‡

Mr. Justice MILLER delivered the opinion of the court.

The admission of the letter having at its head, as a date, "September 10th, 1845," was objected to, and an exception taken, on the ground, among others, that the plaintiff could not introduce his own declaration, or that of those under whom he claimed, to show that the ancestor of the defendants had entered under the person making the declaration. Other and more specific grounds of objection were taken, but it is not necessary to mention them here, for it is certainly a

* Butler v. Mountgarret, 6 Irish Law Reporter, New Series, 102.

† Hunt v. Massey, 5 Barnewall & Adolphus, 902; Anderson v. Weston, 6 Bingham's New Cases, 296; Butler v. Mountgarret, 6 Irish Law Reporter, New Series, 102.

‡ Greenleaf's Lessee v. Birth, 5 Peters, 135; Coale v. Harrington, 7 Harris & Johnson, 147, 157; Union Bank v. Planters' Bank, 9 Gill & Johnson, 439, 461.

sound principle of evidence that such a declaration as this, whether oral or in writing, is inadmissible, unless some exception to the general rule be shown. And this disposes of one of the arguments against the validity of the exception, namely, that while seven distinct objections are stated in the bill of exceptions, none of them are sound, though the letter may really have been inadmissible. We are of opinion that the one above mentioned is sufficient, unless the record shows some matter which would obviate it.

The objection is supposed to be removed by treating the letter as a part of the transaction by which Hamilton Smith obtained possession of the property, and thus coming within the rule of exceptional evidence admitted as part of the *res gestæ*.

But the difficulty is that there is no evidence that the letter *was* a part of that transaction. The precise time when Hamilton Smith took possession is not stated, save that it was in 1845, and after the 28th of May. The date found in the letter itself is relied on to show that it was written about the time possession was taken, and perhaps, if the other essential requisites were proven, the time would be near enough to let it go to the jury. But it is obvious that, as the date is only proved by the letter, the fact that the letter was written and received, must be proved before the date can be used to justify the admission of the letter. Many authorities are cited to show that, while the date found in an instrument may be disputed or disproved by other evidence, it is *primâ facie* to be taken as the true date. All these cases, however, have reference to the case of an instrument which has been admitted in evidence on other and sufficient ground, and where the true date has become important on some other issue than the admission of the letter. It is a most vicious example of reasoning in a circle, to admit the letter to prove the time when it was written, and assume this to be the real date for the purpose of admitting the letter.

Another objection is, that there is nothing in the record to show that the letter was delivered to Hamilton Smith, or

was ever in his possession or acted upon by him. It is not shown how the plaintiff came into possession of it, or from what source it was produced by his counsel at the time of the trial. It would violate nothing found in the record to suppose that the letter was written and delivered to the plaintiff by its supposed author on the same day it was read in evidence. When a party seeks to justify in a court of review the admission of such *ex parte* declarations of himself or his vendor, against the objection of the other side, he must show by the record some circumstance which would obviate the manifest soundness of the objection.

It is said, however, that, conceding the letter to have been improperly admitted, there is enough found in the record to show that the verdict was right, if it had been excluded, and, therefore, its admission worked the defendants no prejudice.

Two letters from Hamilton Smith to his brother are relied on to show his admission, as late as 1856, that he held under that brother, and acknowledged his superior title. And it must be conceded that they have a strong tendency to establish that proposition. But they are not conclusive; and, in the face of the statement that the defendants introduced parol evidence tending to show that Hamilton Smith entered under a parol gift of his father, it is impossible to say the letter worked no prejudice. This *parol* evidence is not given in the bill of exception, and may have been very strong. It is possible, nay, probable, that the jury, balancing between the weight of the parol evidence on one side and the letters of Hamilton Smith on the other, may have rested their verdict on this letter, as the best evidence of what really occurred at the time possession was taken. The jury might very well have said that, if this letter was written and received about the time the possession was taken—written by the man who had title to the land to the party about to enter into possession—they would presume that the latter entered on the premises under the permission given in the letter, while they might disregard the improvident admissions of a weak-minded and dependent man made to his brother ten or twelve years later.

Statement of the case.

We repeat the doctrine of this court laid down in *Deery* v. *Cray*,* that while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of.

Other errors are assigned as to the charge of the court, but, as no exception was taken to that charge, it cannot be considered; nor do we deem the errors alleged as growing out of the prayers asked and refused likely to occur again, even if they are fairly presented by the record now.

For the error in admitting the letter objected to the judgment is reversed and the case remanded for

NEW TRIAL.

Mr. Justice DAVIS was absent at the argument.

DANIEL *v.* WHARTENBY.

A testator gave his estate, both real and personal, to his son, R. T., "during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever." In case R. T. should die without lawful issue, then, in that case, he devised the estate to his own widow and two sisters, "during the natural life of each of them, and to the survivor of them," and after the death of all of them to J. W., his heirs and assigns forever; with some provisions in case of the death of J. W. during the life of the widow and sisters.

Held that the rule in Shelly's Case did not apply, and that the estate in R. T., the first taker, was not a fee-tail, but was an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and in default of such issue remainder for life to his widow and two sisters, with remainder over in fee, after their death, to J. W.

IN error to the Circuit Court for the District of Delaware.

James Whartenby brought ejectment in the court below

* 5 Wallace, 795.

against William Daniel and others for certain premises in the State of Delaware.

Under the instructions given to the jury a verdict was rendered in favor of the plaintiff and judgment was entered accordingly. The defendants, having excepted to the instructions, sued out this writ of error and brought the case here for review.

Mr. Reverdy Johnson, for the plaintiffs in error; Messrs. T. F. and J. A. Bayard, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

The premises in controversy were devised by the will of James Tibbitt. The case turns upon the construction and effect to be given to the following clause of that instrument:

"All the rest, residue, and remainder of my estate, both real and personal, of what kind and nature soever, I give, devise, and bequeath to my son, Richard Tibbitt, during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever. In case my son, Richard Tibbitt, shall die without lawful issue, then, in that case, to my wife, Elizabeth Tibbitt, and my sister, Sarah Heath, and my sister, Rebecca Mull, during the natural life of each of them, and to the survivor of them, and, after the death of all of them, to James Whartenby, son of Thomas Whartenby, of the city of Philadelphia, to him, the said James Whartenby, his heirs and assigns forever. In case the said James Whartenby shall die before my son, Richard Tibbitt, my wife, Elizabeth, my sister, Sarah Heath, and my sister, Rebecca Mull, then, and in that case, to Samuel Stevenson, son of Philip, and to Richard Whartenby, son of John, each two hundred dollars shall be paid out of my estate, and the rest and remainder to William Whartenby, Thomas Whartenby, and John Whartenby, children of said Thomas Whartenby, of Philadelphia, to them and their heirs and assigns forever."

Richard Tibbitt, the first devisee, on the 14th of May, 1853, after the death of the testator, conveyed the premises

to Jacob Hazel, who, on the same day, reconveyed to Richard. Richard died in April, 1863, without issue, not having married. Elizabeth Tibbitt, the widow of the testator, and his two sisters, Sarah Heath and Rebecca Mull, were living at the time of the making of the will, survived the testator, and died before the commencement of this suit. James Whartenby, the devisee in remainder, and the next in succession, is still living, and is the defendant in error in this case. The plaintiffs in error claim title by virtue of a sale under a judgment and execution against Richard Tibbitt.

The rule in Shelley's case is in force in Delaware, and an estate tail may be barred there by such a conveyance as that by Richard to Hazel.

Under the law of descents of Delaware all the children share alike—descendants from them taking *per stirpes*.

The question before us is whether the estate given to Richard, the first taker, was an estate in fee-tail, or whether he took only an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and, in default of such issue, remainder for life to his widow and two sisters, with remainder over in fee after their death to James Whartenby, the defendant in error.

It is insisted by the counsel for the plaintiffs in error that the words "issue of his body by him lawfully begotten" in the devise, are words of limitation and not of purchase, and that the rule in Shelley's case applies.

For the defendant in error it is maintained that those words are the synonym of *children*, and must have the same legal effect as if that phrase had been used by the testator instead of those found in the devise; that under the circumstances they are words of purchase, and that the rule in Shelley's case has, therefore, no application.

That rule is thus laid down by Lord Coke: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same instrument an estate is limited, either mediately or immediately, to his heirs in fee or in fee-tail, *the heirs* are words of limitation of the estate, and not of

purchase."* An eminent English authority gives this definition, as abridged by Chancellor Kent. The chancellor pronounces it accurate. "Where a person takes an estate of freehold, legally or equitably, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."†

The rule is much older than Shelley's case. In that case several judgments in the Year-Books in the time of Edward III are cited in support of it. Blackstone found it recognized in a case adjudged in 18th Edward II.‡ Some writers trace its origin to the feudal system, which favors the taking of estates by descent rather than by purchase, because in the former case the rights of wardship, marriage, relief, and other feudal incidents attached, while in the latter the taker was relieved from those burdens. Others attribute it to the aversion of the common law to fees in abeyance, a desire to promote the transferability of real property, and, as far as possible, to make it liable for the specialty debts of the ancestor. The subject is one of curious and learned speculation rather than of any practical consequence.

Although the rule has been an undisputed canon of the English common law for more than five centuries it has been abolished in most of the States in our Union, and where it still obtains, questions relating to it are of unfrequent occurrence.

In considering it with reference to the present case a few cardinal principles, as well settled as the rule itself, must be kept in view.

In construing wills, where the question of its application arises, the intention of the testator must be fully carried out,

* 1 Reports, 104. † 1 Preston on Estates, 268, 419; 4 Kent, 245.
‡ Hargrave's Law Tracts, 501.

so far as it can be done consistently with the rules of law, but no further.* The meaning of this is that if the testator has used technical language, which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result.† But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail.‡ The rule is one of property and not of construction.§

While the rule is held to apply as well to wills as to deeds, the words *issue of his body* are more flexible than the words *heirs of his body*, and courts more readily interpret the former as the synonym of *children* and a mere *descriptio personarum*, than the latter. "The word *issue* is not *ex vi termini* within the rule in Shelley's case. It depends upon the context whether it will give an estate tail to the ancestor."‖

Where there is a devise like this, if the rule in Shelley's case applies, the estate, upon the death of the first taker, goes, according to the English common-law rule of descent, to the eldest son, to the exclusion of all the other children.¶ But if to the gift in remainder there are superadded words of limitation which change this course of descent, the rule in Shelley's case does not apply and the children take by purchase.**

It remains to examine the case before us in the light of these considerations.

* Hargrave's Law Tracts, 489. † Ib ; 2 Jarman on Wills, 311, 313.

‡ Hargrave's Law Tracts, 495; Wild's Case, 6 Reports, 16; Doe v. Laming, 2 Burrow, 1100; Lees v Mosley, 1 Younge & Collyer (Exch.), 589; Bagshaw v. Spencer, 1 Vesey, 142.

§ Tod's Leading Cases on Real Property, 483.

‖ 1 Preston on Estates, 379. ¶ Sisson v. Seabury, 1 Sumner, 244.

** Shelley's Case, Tod's Leading Cases on Real Property, 493; Montgomery v. Montgomery, 3 Jones & Latouch, 47; Doe d. Bosnall v. Harvey, 4 Barnewall & Cresswell, 610.

The estate is given to Richard, the first taker, "*during his natural life.*"

Lord Chancellor Sugden says these words "are, I think, entitled to weight, although when the intention requires it they may be wholly rejected."*

The estate is given, "after his death, to his issue by him lawfully begotten of his body." These must necessarily have been *his children.* They could not have been otherwise. It will do no violence, either to the language here used or to the context, if this clause be regarded as if the testator had substituted the latter words for the former in framing this part of the instrument. If this had been done there could have been no controversy between these parties.† The words of inheritance which follow are, "to such issue, their heirs and assigns, forever." These are the usual and largest terms employed in the creation of a fee simple estate. A descent of the property, to satisfy them, must be according to the law of inheritance of the State of Delaware with respect to fee simple property. Such would be the inevitable result, and such clearly was the intention of the devisor.

This would be an entire departure from the course of descent which must necessarily follow from the rule in Shelley's case, if that rule were to control the transmission of the inheritance. The descent prescribed is to be, not from Richard, but from his issue. The language of the testator is too explicit to leave any room for doubt upon the subject.

In *Montgomery* v. *Montgomery*, before referred to,‡ the chancellor said: "It appears to be clearly settled that a devise to A. for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with the descent from A., will give the word *issue* the operation of a word of purchase. This is established by a series of cases,

* Montgomery *v.* Montgomery, 3 Jones & Latouch, 61; see, also, Archer's Case, 1 Coke, 67; Clerk *v.* Day, Cro. Eliz., 318; Wild's Case, *supra;* Doe *v.* Collis, 4 Term, 294; Ginger *v.* White, Willes, 348.

† *In re* Sanders, 4 Paige, 293; Rogers *v.* Rogers, 3 Wendell, 503; Chrystie *v.* Phyfe, 19 New York, 344; Wild's Case, 6 Reports, 17.

‡ 3 Jones & Latouch, 61.

from *Doe d. Cooper* v. *Collis*,* to *Greenwood* v. *Rothwell*."† *Issue* is either a word of purchase or limitation, as will best effectuate the devisor's intention.‡

The next clause is: "In case my said son, Richard Tibbitt, shall die without lawful issue, then, and in that case, to my wife, Elizabeth Tibbitt, my sister Sarah Heath, and my sister, Rebecca Mull, during the natural life of each of them, and to the survivors of them; and, after the death of all of them, to James Whartenby, son of Thomas Whartenby, of the city of Philadelphia, to him, the said James Whartenby, *his heirs and assigns forever*."

These are substitutionary devises, both contingent upon the death of Richard without issue. In that event, an estate for life was given to the widow and two sisters, and a remainder in fee to James Whartenby. That such was the quantity and quality of these estates, if Richard was not a donee in tail, cannot be doubted.

Finally, the devisor declares, that "in case the said James Whartenby shall die before my son, Richard Tibbitt, my wife, Elizabeth, my sister, Sarah Heath, and my sister, Rebecca Mull, then, and in that case, to Samuel Stevenson, son of Philip, and Richard Whartenby, son of John, each two hundred dollars shall be paid out of my estate, and the rest and remainder to William Whartenby, Thomas Whartenby, and John Whartenby, children of the said Thomas Whartenby, of Philadelphia, to them and their heirs and assigns."

The language used with reference to the devisees last named was sufficient, if the devise had taken effect, to give them a fee simple estate. That language, as well as the fact that there was no further devise over, leads necessarily to the conclusion that such was the purpose of the testator.

In describing the estate given to Richard, and that given to the widow and two sisters, in the contingencies specified, the terms of the devise in each case are the same. They are, *during the natural life* of each devisee. So, as to the

* 4 Term, 294.

† 6 Scott's New Reports, 670.

‡ Doe v. Collis, 4 Term, 294.

estate given to the issue of Richard, if any should survive him; the estate given to James Whartenby, in default of such issue; and that given contingently to the three devisees last named, the same language is employed in each case. The devise is *to them, their heirs and assigns forever.*

Why should a different effect be given to the same language when applied to different persons in the same class? If the widow and two sisters could take under that employed as to them only an estate for life, why should Richard take more? And if James Whartenby and the three last-named devisees could take a fee simple, which, laying out of view the deed to Hazel, no one questions, why not the issue of Richard, if such issue had been born and survived him? The identity of the language and the aptness of the terms employed indicate the meaning and purpose of the testator in each case.

The theory that only a life estate was intended to be given to Richard, derives further support from the solicitude manifested by the testator, that whatever Richard might take under the will should not be subjected to the payment of the liability he had incurred as the surety of his brother. In that event the testator declares that "all the right of the said Richard shall cease and determine as fully as though he were dead, and that no purchaser shall have any right, title, or claim thereby to any part of my estate so sold."

It cannot reasonably be supposed that the testator intended to give Richard a fee, which even with his consent might be "so sold," and if he had children, thus cut them off and transfer the estate out of the family; and if he left no issue, defeat the rest of the scheme of the will. These results could be guarded against only by giving a life estate to Richard, and nothing more.

In this class of cases in the English courts the doctrine of Shelley's case is applied unless there are circumstances which clearly take the devise out of that rule. Every doubt is resolved in favor of its application. Here, we think, the tendency should be otherwise.

There, the rule is in accordance with the established law

of descent—the general sentiment of the people—their public policy and the spirit of their institutions. It helps to conserve the power and splendor of the ruling classes, by keeping property in the line of descent which the rule prescribes.

Our policy is equality of descent and distribution. Such is the sentiment of our people, and such the spirit of *our* institutions.

This is manifested by the statutes of descent and distribution which exist in all our States and Territories.

We entertain no doubt that the testator intended to give a life estate only to Richard, and a fee simple to his issue, and that they should be the springhead of a new and independent stream of descents. We find nothing in the law of the case which prevents our giving effect to that intent.

We hold that the rule in Shelley's case, for the reasons stated, does not apply. The estate given to the children of Richard was a contingent remainder. Upon the birth of the first child it would have vested, but subject to open and let in after-born children. The devise to Richard and his issue disposed of the entire estate. The devises over to the widow and testator's two sisters, and to James Whartenby, were executory devises. Upon the death of Richard, with the possibility of issue extinct, the devise to James became a remainder in fee simple vested at once in interest, but deferred as to the period of enjoyment until the termination of the intermediate life estates.*

Numerous authorities have been cited on both sides. We have examined them and many others. It is impossible to reconcile the conflict which they present. Lord Chancellor Sugden said no one could do it.† No controlling principle can be deduced from them.

The conclusion at which we have arrived is sustained by many well-considered cases, both English and American.

---

* Doe v. Howell, 10 Barnewall & Cresswell, 196; Doe v. Howell, 5 Manning & Ryland, 24.

† Montgomery v. Montgomery, 3 Jones & Latouch, 50.

We think that the learned judge who tried the case below instructed the jury correctly.

JUDGMENT AFFIRMED.

WALKER v. THE STATE HARBOR COMMISSIONERS.

In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of the State. Its interpretation is accepted as the true interpretation, whatever may be the opinion of this court of its original soundness. So held in a case where the Supreme Court of California had construed the terms "tide lands," used in a statute of that State, as applying only to lands covered and uncovered by the tides, and as not including lands permanently submerged by the waters of the bay of San Francisco.

ERROR to the Circuit Court of the United States for the District of California.

Walker brought an action of ejectment against Marks and others, the Board of State Harbor Commissioners, for certain real property situated within the limits of the city of San Francisco, State of California. The case, which was tried by the court without a jury, by consent of parties, arose as follows:

In March, 1851, the legislature of the State of California granted to the city of San Francisco an estate for ninety-nine years in certain lands covered by the tide-waters of the bay of San Francisco, situated within a designated line, described according to a map on record in the recorder's office of the county, and declared that the line thus designated should "be and remain a permanent water-front" of the city, reserving at the same time to the State the right to regulate the construction of wharves and other improvements beyond the line, so that they should not interfere with the shipping and commercial interests of the city and harbor.

The premises in controversy were situated beyond and immediately adjoining this line, and were covered by the navigable waters of the bay at the lowest tide. If the streets, as laid down on the map of the city, were extended into the bay, the premises would form an entire block. Two grants, together embracing the premises, were made, one in 1848, and one in 1849, by an alcalde of the pueblo of San Francisco. Under these grants, and an act of the legislature of California, approved on the 14th of May, 1861, which it was contended, confirmed the grants, the plaintiff asserts title to the demanded premises.

The defendants, who constituted the Board of State Harbor Commissioners, were created under the act of the legislature, passed in 1863, entitled "An act to provide for the improvement and protection of the wharves, docks, and water-front of the city and county of San Francisco." By this act and a supplement to it passed in 1864, the defendants were authorized to take possession of and hold the bay which lies along the water-front of the city and county of San Francisco, and adjacent thereto, to the extent of six hundred feet, with the privileges and appurtenances, except such portions as were held under valid leases, and of those portions when the leases expired; and to construct a street along the line of the water-front, and wharves, docks, and other improvements intended for the convenience of shipping and commerce. In pursuance of the authority thus conferred, and for the purposes designated, the defendants took possession of the premises in controversy.

The act of the legislature upon which the plaintiff relied as confirming the alcalde grants is entitled "An act to provide for the sale of the marsh and tide lands of the State." It confirms the sales of all such lands previously made in accordance with any act of the legislature providing for the sale of the swamp and overflowed lands of the State, with a proviso, as follows: "That no sales of lands, either tide or marsh, *excepting alcalde grants, which are hereby ratified and confirmed*, within five miles of said cities (San Francisco and Oakland), or within one mile and one-half of the State prison

grounds aforesaid (at Point San Quentin), shall be confirmed by this act."*

The Circuit Court held that the alcalde grants under which the plaintiff claimed, were not confirmed by the act of the legislature of May 14th, 1861, and gave judgment for the defendants; and the plaintiff thereupon brought the case to this court on writ of error.

Messrs. John E. Ward and Hall McAllister, for the plaintiff in error; Mr. T. T. Crittenden, contra:

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The alcaldes of the pueblo of San Francisco possessed no authority to grant any lands covered by the tide-waters of the bay. The grants, therefore, under which the plaintiff claims were inoperative to pass any title to the premises. This is admitted by counsel on both sides, and the only question presented by the record for our determination is whether the grants were confirmed by the act of the legislature of May 14th, 1861.

That question is not an open one for this court. It has received its authoritative solution by the judgment of the Supreme Court of the State. In the case of *The People* v. *Davidson*,† the question arose in that court whether the premises, upon which the defendants there had constructed a wharf, which were the same premises in controversy here, belonged to the defendants, who claimed them under the same alcalde grants and the same act of the legislature of May 14th, 1861, and the court, after full and extended consideration, held that the terms "tide lands," used in the act, applied only to lands covered and uncovered by the tides, and did not include lands permanently submerged by the waters of the bay of San Francisco; that the alcalde grants confirmed by the act were grants only of tide lands as thus defined, and did not embrace the grants under which the

* Statutes of California of 1861, p. 868. † 30 California, 372.

defendants claimed, and that the premises, so far as they lay below the line of low-water mark, belonged to the State.

It is not for us to express any opinion as to what would be our construction of the act had the Supreme Court of the State never spoken on the subject. In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of the State. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it, and in following the statute as thus interpreted we only apply to a local question the law of the place. As has been often remarked, infinite mischiefs would result if, in construing State statutes affecting titles to real property, where no Federal question is involved, a different rule were adopted by the Federal tribunals from that of the State courts.

JUDGMENT AFFIRMED.

THE STAR OF HOPE.

Nuts in bags and boxes were shipped at New York to be delivered at San Francisco. It was shown on the trial that if nuts are stowed in the hold on this voyage they are very liable to be injured by sweat; that it is the almost invariable practice to carry them in the cabin, or cabin state-rooms, and to enter them on the bill of lading as to be thus carried; and that if they are carried in the hold they are sometimes inclosed in water-tight oil casks in order to keep them in proper condition. The packages in this case were all marked "in cabin state-room." The contract of the bill of lading was that the goods should be delivered in San Francisco "in good order and condition, dangers of the seas, fire, and collisions excepted." The goods were placed in the hold without notice to the shippers, and were damaged on the voyage by sweating. *Held*, that in view of the almost invariable practice as to the stowage of nuts on this voyage, of the well-known fact that if stowed in the hold they are extremely liable to be injured by sweat, and of the marks and directions on the packages in question in this case, it was culpable negligence

in the master of the vessel to stow them in the hold, and that the vessel was liable accordingly.

APPEAL from the Circuit Court for the District of California.

Church & Clark libelled the ship Star of Hope, in the District Court for California, for damages done to a quantity of nuts in bags and boxes, which had been shipped at New York on board of the said vessel, to be delivered to them at San Francisco. It was clearly shown on the trial that if nuts are stowed in the hold on this voyage they are very liable to be injured by sweat; that it is the almost invariable practice to carry them in the cabin, or cabin state-rooms, and to enter them on the bill of lading as to be thus carried; and that if they are carried in the hold they are sometimes inclosed in water-tight oil casks in order to keep them in proper condition. The packages in this case were all marked "in cabin state-room," and when they were delivered for shipment receipts were given by the receiving clerk of the vessel, specifying in the margin the marks of the goods, including the direction above quoted. But the bill of lading, which was received by the shippers after the parcels were delivered, omitted any allusion to this direction. It contracted simply that the goods should be delivered in San Francisco "in good order and condition, dangers of the sea, fire, and collisions excepted." The goods were placed in the hold without notice to the shippers, and having been injured on the voyage this libel was filed for damages.

The District Court decreed in favor of the libellants; and the Circuit Court having affirmed the decree, this appeal brought the case here for review.

Mr. C. Donohue, for the appellant:

The only contract that binds the parties, and on which all parties are compelled to rely, is the bill of lading. The contract being in writing, that alone must govern. This was the decision of this court in *The Delaware;** a decision

* 14 Wallace, 579.

the more authoritative since it was made, as the report of the case shows, after one of the fullest, ablest, and most learned arguments at the bar, on the other side of the question, which it was possible to make. That case also decided that a "clean" bill of lading, that is to say, a bill which was silent as to the place of stowage, imports a contract that the goods are to be stowed under deck. But it has never been decided, nor, so far as we know, supposed that such a bill imports a contract that goods are to be stowed in the cabin state-room; a place not appropriated to the stowage of goods at all.

As, therefore, no particular place was specified for the stowage of the goods, they were sufficiently stowed when they were stowed in the ordinary place—the place where, according to *The Delaware*, the bill imported that they should be stowed, *i. e.*, anywhere between decks in the hold.

The "sweating" was a danger of the sea; an excepted danger, therefore, under the bill of lading.

Mr. C. E. Whitehead, contra:

1. A clean bill of lading imposes an obligation to store under the deck. This, we agree with the other side in saying, was decided in *The Delaware*. Now the agreement to store in the cabin is not an agreement in contradiction to that implied obligation. On the contrary, it is ancillary to it, and aids it in a point upon which the bill of lading is silent. A written contract may always be thus aided.*

2. The libellants proved "a custom of trade" to store nuts in the cabin, and having shown that nuts stored otherwise would be injured, the master is chargeable with negligence for storing in the hold, whether he gave a bill of lading or not, or whether there was an express agreement or not.† In *Blakie* v. *Stembridge*,‡ an action was brought by a

* Bonney v. Morrill, 57 Maine, 372; Blossom v. Griffin, 13 New York, 569; Witbeck v. Waine, 16 Id. 535; Filkins v. Whyland, 24 Id. 338.

† Angell on the Law of Carriers, 4th ed., 187, and cases there cited; Lamb v. Parkman, 1 Sprague, 343.

‡ 5 Jurist, New Series, 1128.

shipper for damages occasioned by sweat on a voyage from China, by reason of improper stowage. The court held that the question of negligence would be governed by the custom of trade, and if the goods were stowed according to the customary way in that particular trade, the vessel would be absolved, otherwise not.

3. The receiving clerk of the vessel when the nuts were delivered for shipment, gave what amounted to a receipt, that they were to be carried "in cabin state-room." Given as this receipt was, it must be considered as so far forming part of the bill of lading, that the latter must be read by its light. Contemporaneous written documents are to be construed together.*

Indeed, the court, on trial, could at any time have amended the bill of lading, as was done in *Chouteaux* v. *Leech*,† in regard to anything omitted therefrom through a clerical error, and contrary to the understanding of the parties.

Mr. Justice BRADLEY delivered the opinion of the court.

The claimant insists that the bill of lading is the only contract binding on him, and as that did not specify any particular place for the stowage of the goods, they were properly stowed between decks in the hold.

This is not a sufficient answer to the libellants' case. The contract of the bill of lading was, that the goods should be delivered in San Francisco "in good order and condition, dangers of the seas, fire, and collisions excepted." The defence is to the effect that "sweating" is one of the dangers of the seas. But if the sweating be produced in consequence of negligent stowage, the claimant is precluded from setting up the defence. If costly mirrors are stowed amongst loose articles of hardware, or if a case inclosing valuable statuary, and marked "This side up with care," is placed upside down amongst a lot of pig-iron, the claimant could hardly contend that he is protected from responsibility by the clause relating to the dangers of the seas. In this matter, as in all

* Hunt v. Livermore, 5 Pickering, 395.

† 18 Pennsylvania State, 224.

others, due care and its opposite, negligence, are relative terms, having respect to the nature of the duty to be performed, the knowledge communicated to the party to be charged, and the prevailing usages of the business. In view of the almost invariable practice as to the stowage of nuts on this voyage, of the well-known fact that if stowed in the hold they are extremely liable to be injured by sweat, and of the marks and directions on the packages in question in this case, it was culpable negligence in the master of the vessel to stow them in the hold. If he could not stow them as directed, he should, at least, have given notice to the shippers.

This view of the case is sufficient to dispose of it without deciding whether the evidence in reference to the stowage of nuts established a custom of the trade in the proper sense of that term, or whether the shipping receipts were a part of the contract of affreightment.

DECREE AFFIRMED WITH INTEREST AND COSTS.

MILLER v. JOSEPH ET AL.

A writ of error from the Supreme Court of the United States to review the judgment of a State court must be issued to the highest court of the State in which a decision of the case could be had, even if that court be an inferior court of the State. Accordingly, where a Circuit Court of Virginia had jurisdiction to decide a case finally, the Court of Appeals of that State not having jurisdiction to review the decision, by reason of the amount in controversy being under $500, a writ of error from this court issued to the Court of Appeals was dismissed. If allowable at all, the writ should have been issued to the Circuit Court.

ERROR to the Supreme Court of Appeals of Virginia; the case being thus:

In 1868 one Joseph recovered a judgment in the Circuit Court of Rockingham County, Virginia, against a certain Miller for a sum less than $500—costs and interest included—and issued execution thereon. In 1869 Miller filed a bill

in chancery in the same Circuit Court to restrain the collection of the judgment and for a new trial, making Joseph and the sheriff of that county parties. They appeared and answered. The Circuit Court, at the hearing, which was had on the pleadings, dismissed the bill.

The plaintiff then applied to the Supreme Court of Appeals of the State to allow an appeal from the decree of the Circuit Court, but that court refused to allow it. Miller then sued out of this court a writ of error to review this action of the Supreme Court of Appeals. With certain exceptions, not embracing the present case, the constitution of Virginia of 1870 does not allow an appeal in civil cases where the amount in controversy is under $500.

Mr. David Fultz, for the plaintiff in error; Messrs. Woodson and Compton, contra.

Mr. Justice FIELD delivered the opinion of the court.

The writ of error in this case must be dismissed. The Court of Appeals of Virginia had no jurisdiction to review the decree of the Circuit Court of Rockingham County, and therefore rightfully refused to allow an appeal therefrom. The amount in controversy was less than five hundred dollars, and the constitution of Virginia, of 1870, withholds jurisdiction from the Court of Appeals in civil cases where the matter in controversy is under that sum, with certain exceptions within which the present case does not fall. The Circuit Court of Rockingham County is the highest tribunal of the State in which a decision of the case could be had, and if a writ of error to review its judgment was allowable at all from this court, it should have been issued to that court and not to the Court of Appeals.*

WRIT DISMISSED.

* Constitution of Virginia of 1870, Art. VI, sec. 2.

RAILROAD COMPANY v. STOUT.

1. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.
2. While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.
3. Though it is true, in many cases, that where the facts of a case are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury.

ERROR to the Circuit Court for the District of Nebraska.

Henry Stout, a child six years of age and living with his parents, sued, by his next friend, the Sioux City and Pacific Railroad Company, in the court below, to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space, about eighty rods from the company's depot, in a hamlet or settlement of one hundred to one hundred and fifty persons. Near the turntable was a travelled road passing through the depot grounds, and another travelled road near by. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine and the other ten years of age, to go to the depot, with no definite purpose in view. When

the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it, the foot of the child (he being at the time upon the railroad track) was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there, to any of the officers or servants of the company having the table in charge.

One of the boys, who was with the child when injured, had previously played upon the turntable when the railroad men were working on the track, in sight, and not far distant.

It appeared from the testimony that the child had not, before the day on which he was now injured, played at the turntable, or had, indeed, ever been there.

The table was constructed on the railroad company's own land, and, the testimony tended to show, in the ordinary way. It was a skeleton turntable, that is to say, it was not planked between the rails, though it had one or two loose boards upon the ties. There was an iron latch fastened to it which turned on a hinge, and, when in order, dropped into an iron socket on the track, and held the table in position while using. The catch of this latch was broken at the time of the accident. The latch, which weighed eight or ten pounds, could be easily lifted out of the catch and thrown back on the table, and the table was allowed to be moved about. This latch was not locked, or in any way fastened down before it was broken, and all the testimony on that subject tended to show that it was not usual for railroad companies to lock or guard turntables, but that it was usual to have a latch with a catch, or a draw-bolt, to keep them in position when used.

Argument for the railroad company.

The record stated that "the counsel for the defendant disclaimed resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rested their defence on the ground that the company was not negligent, and asserted that the injury to the plaintiff was accidental or brought upon himself."

On the question whether there was negligence on the part of the railway company in the management or condition of its turntable, the judge charged the jury—

"That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The jury found a verdict of $7500 for the plaintiff, from the judgment upon which this writ of error was brought.

Mr. Isaac Cook, for the plaintiff in error, insisted—

1st. That the party injured was himself in fault, that his own negligence produced the result, and that upon well-settled principles, a party thus situated is not entitled to recover.

2d. That there was no negligence proved on the part of the defendant in the condition or management of the table.

3d. That the facts being undisputed, the question of negligence was one of law, to be passed upon by the court, and should not have been submitted to the jury.

Mr. S. A. Strickland, contra.

Mr. Justice HUNT delivered the opinion of the court.

1st. It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.*

But it is not necessary to pursue this subject. The record expressly states that "the counsel for the defendant disclaim resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defence on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself."

This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form, or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and therefore cannot recover.

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of *Lynch* v. *Nurdin*,† the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In *Birge* v. *Gardner*,‡ the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In *Daly* v. *Norwich and Worcester Railroad Company*,§ it is

* Railroad Co. v. Gladmon, 15 Wallace, 401.

† 1 Adolphus & Ellis (new series), 29.

‡ 19 Connecticut, 507.

§ 26 Id. 591.

said the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.

In *Bird* v. *Holbrook** the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable.

There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

2d. Was there negligence on the part of the railway company in the management or condition of its turntable?

The charge on this point (see *supra*, p. 659) was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred

* 4 Bingham, 628; see, also, Loomis v. Terry, 17 Wendell, 496; Wright v. Ramscot, 1 Saunders, 83; Johnson v. Patterson, 14 Connecticut, 1; State v. Moore, 31 Id. 479.

to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents.

So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the in-

jury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.

3d. It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sen-

sible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

In Redfield on the Law of Railways,* it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury."†

In *Patterson* v. *Wallace*,‡ there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the

* Vol. 2, p. 231.

† Quimby v. Vermont Central Railroad, 23 Vermont, 387; Pfau v. Reynolds, 53 Illinois, 212; Patterson v. Wallace, 1 McQueen's House of Lords Cases, 748.

‡ 1 McQueen's House of Lords Cases, 748.

jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the judgment was reversed.

In *Mangam* v. *Brooklyn Railroad*,* the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a nonsuit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the nonsuit.

In *Detroit and W. R. R. Co.* v. *Van Steinberg*,† the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.‡

It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of the opinion that it was properly left to the jury to determine that point.

Upon the whole case, the judgment must be

AFFIRMED.

* 38 New York (11 Tiffany), 455. † 17 Michigan, 99.

‡ See among other cases cited, the following: Carsly v. White, 21 Pickering, 256; Rindge v. Inhabitants of Coleraine, 11 Gray, 157; Langhoff v. Milwaukee and P. D. C., 19 Wisconsin, 497; Macon and Western Railroad v. Davis, 13 Georgia, 68; Renwick v. New York Central Railroad, 36 New York, 132.

Syllabus.

THE EMILY SOUDER.

1. In June, 1865, the American steamer Emily Souder, owned by residents in New York, whilst on a voyage to that port from Rio Janeiro lost her propelling screw, and put into the port of Maranham, on the coast of Brazil, in distress. She was towed into that port by another steamer for which she had signalled. The captain was without adequate funds to make the repairs required and furnish the vessel with the supplies necessary to enable her to proceed on her voyage, or to pay the expenses of her towage into port, and of pilotage, custom-house dues, fees of the consul in the port, and expenses of medical attendance upon the sailors. Both he and the owners of the vessel were unknown in Maranham, and without credit there. Under these circumstances the captain borrowed of the libellants the necessary funds to enable him to pay these several expenses, and gave them drafts on the owners of the vessel in New York for the amount, payable thirty days after sight, which drafts were accepted on presentation, but were protested for non-payment; *Held*, 1st, that the items of expense for towage, pilotage, custom-house dues, consular fees, and medical attendance upon the sailors stood in the same rank with the repairs and supplies to the vessel, and that the libellants advancing funds for their payment were equally entitled as security to a lien upon the vessel; 2d, that the drafts were only conditional payment, and did not discharge and satisfy the original debt.
2. After the libellants in one of the cases had agreed with the captain to advance all the funds required by him, the libellant in the other case, who had been first applied to by the captain, agreed to advance a portion of the funds, and did so; *Held*, that this subsequent agreement did not affect the implied hypothecation of the vessel for the whole, the advances by both libellants having been made on the credit of the vessel and not solely on the personal credit of the captain or owners.
3. The presumption of law is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account.
4. The presumption in such cases can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.

Statement of the case.

5. Liens for advances of funds for the necessities of vessels in a foreign port have priority over existing mortgages to creditors at home.
6. Where advances in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may direct that its decrees be entered for the amount in like currency.

APPEALS from the Circuit Court for the Southern District of New York.

The firm of Packenham Beatty & Co., and also a certain Pritchard, filed separate libels in the District Court of the district just mentioned, against the steamer Emily Souder, an American vessel, owned in New York. The case was thus:

The steamer while on a voyage to that port from Rio Janeiro in June, 1865, lost her screw, and was compelled to put into the port of Maranham, on the coast of Brazil, for repairs. Her captain was without funds, sufficient to meet the expenses for these repairs, and other expenses incurred and to be incurred to enable the vessel to proceed on her voyage. The funds in his possession did not amount to $600, and both he and the owners of the vessel were unknown in the port of Maranham, and without credit. He accordingly applied to the consul of the United States there to find him a consignee, who would advance the necessary funds and attend to the business of the vessel. The consul applied in company with the captain to several persons without success, but finally an arrangement was made which was satisfactory, with the firm of Packenham Beatty & Co., merchants at that port; they to receive five per cent. commission on the amount advanced, and five per cent. commission for attending to the business of the vessel.

The steamer was repaired, and supplies furnished to enable the vessel to proceed on her voyage, and the funds for these items, and also to pay the charges for towing the vessel when disabled into port by another steamer which had been signalled for, and for pilotage, and for the dues at the custom-house, fees of the consul, and charges for medical attendance upon the sailors in port, were furnished by

the libellants. The different items were all submitted to the captain, and were approved by him before they were paid.

Pritchard, one of the libellants, was applied to by the captain to advance the funds before the arrangement was made with Packenham Beatty & Co., the other libellants. He then said that he would see what he could do. Afterwards he consented to advance a portion of the funds. Accordingly two drafts were drawn by the captain on the owners of the vessel in New York, for the amounts advanced, and one of them was given to Pritchard, and the other to Packenham Beatty & Co. The drafts were payable thirty days after sight in gold; the currency in which the advances were made. The drafts were presented and accepted, but on their maturity were protested for non-payment. The holders thereupon filed libels against the vessel, producing the drafts in court on the trial, and surrendering them for cancellation. Beatty, of the firm of Packenham Beatty & Co., and Pritchard, both testified that the advances in Maranham were made on the credit of the vessel, and would not have been made on any other condition; but that the drafts were taken only as conditional payment, and not in satisfaction of the sums advanced. The testimony of the captain was somewhat in conflict with this, he stating that the advances were made on the credit of the owners of the vessel and upon drafts on them, nothing being said at the time about bottomry of the vessel or raising money on her credit.

The vessel was at the time the advances were made under mortgage to the former owners for the purchase-money. They were obliged to take back the vessel before the libels were filed, and they were the claimants here.

The District Court rendered a decree in favor of the libellants in both cases, for the amounts advanced by them respectively, with interest, and directed that the amounts should be paid in gold coin of the United States. The Circuit Court affirmed the decrees and the claimants appealed to this court.

Mr. Charles Donohue, for the appellants; Mr. C. Van Santvoord, contra.

Mr. Justice FIELD delivered the opinion of the court.

The rule announced in *The Grapeshot*,* and there relieved from the supposed embarrassment of some previous decisions of this court, and repeated and affirmed in *The Lulu*,† and *The Kalorama*,‡ and followed in *The Patapsco*,§ disposes of the main question in these cases. The steamer here had entered the port of Maranham, on the coast of Brazil, in distress; she had lost her propelling screw, and was towed into port by another steamer, for which she had signalled. The repairs there made to the vessel, and the supplies furnished to her, and the expenses incurred on her account, were necessary to render her seaworthy and enable her to leave the port and prosecute her voyage to New York. The captain was without adequate funds for these purposes, the whole amount in his possession being under $600, and that sum being insufficient to meet the contingent expenses of the vessel. Both he and the owners of the vessel were unknown in Maranham, and without credit there. It was under these circumstances that he requested the consul of the United States in that port to obtain for him a consignee who would attend to the business of the vessel and advance the requisite funds. And it was only after applying without success to several parties, that he succeeded in inducing the firm of Packenham Beatty & Co., the libellants in one of these cases, to make the arrangement desired with the captain. The stipulation in the arrangement for five per cent. commission on the funds advanced, and five per cent. commission for attending to the business of the vessel was not unreasonable nor unusual. The steamer was detained at Maranham nearly five weeks, and the moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed for the voyage; they were intended and applied in part to meet the expenses of

* 9 Wallace, 129. † 10 Id. 192. ‡ Ib. 204. § 13 Id. 329.

her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary repairs and supplies to the vessel, and the libellants advancing funds for their payment, were equally entitled as security to a lien upon the vessel. The items were all submitted to the examination of the captain, and were approved by him before they were paid.

The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment; it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent. But here the evidence of the libellants is direct and positive that the drafts were only taken as conditional payment, and on the trial they were produced and surrendered for cancellation.*

The consent of Pritchard, the libellant in one of the cases, to advance a portion of the funds after Packenham Beatty & Co. had agreed to advance the whole, does not in our judgment in any respect affect the implied hypothecation of the vessel for the whole. The whole sum advanced was required, and the question is not whether it came from one or more parties, or whether the advances were made at one time or at different times, but whether they were made on the personal credit of the captain or of the owners, or were made on the credit of the vessel also. And upon this question there can be in this case no reasonable doubt. The presumption of law always is, in the absence of fraud or

* The Kimball, 3 Wallace, 37; The Bark Chusan, 2 Story, 456.

collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. The presumption arises that such is the fact from the necessities of the vessel, and the position of the parties considered with reference to the motives which generally govern the conduct of individuals. Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties. The presumption, therefore, that advances in such cases are made upon the credit of the vessel is not repelled by any loose and uncertain testimony as to the suppositions or understandings of one of the parties. It can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.

In the cases at bar, the presumption is not only not repelled by any satisfactory evidence, but is supported by the positive testimony of the libellants. Beatty, who appears to have transacted the business of Packenham Beatty & Co. with the captain, and Pritchard, both declare in the most emphatic manner that they made the advances on the credit of the vessel, and would not have made them on any other condition.

The evidence of the captain, it is true, is to some extent in conflict with their testimony, but considering the circum-

stances under which the advances were made, it is entitled, as against their direct and positive declarations, to little weight. Perhaps, as suggested by the Circuit Court in its opinion, the inferences of the captain were not the result of any intended untruth on his part, but were drawn from the fact that nothing was said during the negotiation for advances intimating in terms that the libellants were to have a lien upon the vessel.

The fact that the vessel was, at the time the advances were made, under mortgage to the claimants, does not subordinate the lien of the libellants to the claim of the mortgagees. Funds furnished in a foreign port, under the circumstances and for the purposes mentioned in this case, have priority as a lien upon the vessel over existing mortgages. Advanced for the security and protection of the vessel, they were for the benefit of the mortgagees as well as of the owners. If liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as having any certain value, or as affording any reliable security.

As the advances were in gold, and the drafts on the owners in New York show that the payment to the libellants was to be made also in gold, the court below ruled rightly in directing its decrees to be entered for the amount due them in like currency.*

DECREE AFFIRMED in both cases, with interest and costs.

LIFE INSURANCE COMPANY v. FRANCISCO.

1. When, under the terms of a policy of life insurance, the representatives of the party assured are to furnish, within a certain time after the death of the assured, "due proof of the just claim of the assured,"—if the party claiming the insurance-money have within the time furnished answers written out in the presence of the insurers' agent, to certain

* Bronson v. Rodes, 7 Wallace, 229; Trebilcock v. Wilson, 12 Id. 687.

Statement of the case.

printed questions usually furnished by the insurer, for the purpose of seeing whether the claim is just or not, and the insurer receive and keep the questions and answers without any suggestion that such preliminary proofs are insufficient, either in form or substance,—the court, on a suit for the insurance-money, has no right to determine as matter of law, that the questions and answers do not establish the justice of the plaintiff's claim, and that the plaintiff is not entitled to a verdict. Questions and answers so given furnish some evidence that the claim is just; and the matter is proper for the jury even though the contents of the paper do not as yet appear.

2. A rule of court that "in causes tried by a jury, any special charge or instruction asked for by either party, must be presented to the court in writing, directly after the close of the evidence, and before any argument is made to the jury, or it will not be considered," is a reasonable rule; and the enforcement or disregard of it is matter of discretion with the court making it, and, therefore, not the subject of a writ of error.

3. Where a medical man testifies that the "disease" of a person who had died, and on whose death a claim for insurance was made, "had been indigestion, torpid liver and colic, and that he died of acute hepatitis," and several other persons, the acquaintances of the deceased, testify that they had never known him to be unwell, or if so more than very slightly, and that they considered him to be a healthy man, an instruction to the jury that the evidence was not sufficient to enable the plaintiff (who was suing for the insurance-money on a policy of life insurance, previous to the grant of which the decedent had answered in reply to the usual questions that he had "no sickness or disease,") to recover, was held to have been rightly refused; and that the jury were rightly instructed that it was for them to determine whether the deceased had been afflicted with any sickness or disease, within the meaning of the terms as used in his answers to questions put to him prior to the issue of the policy.

ERROR to the Circuit Court for the District of California; the case being thus:

Dolores Francisco sued the Manhattan Life Insurance Company upon a contract of insurance, made February 5th, 1867, upon the life of her husband. The husband died twenty-four days afterwards; that is to say on the 1st of March, 1867, and before the policy actually issued. There were two conditions in the policy, which would have been issued had Francisco lived:

1st. That if any representation made by the assured in the application for the policy should prove to have been untrue, the policy should be void.

2d. That payment of the loss would be made within

ninety days after notice of the death, and due proof of *the just claim* of the assured.

Upon the trial of the cause the plaintiff offered evidence to prove the contract, and the death of her husband, and also that she had filled up in the presence of the agent of the company and handed to him, who received them without any objection, blank forms which had been furnished by the company, and which were those always used in making proof of death, but offered no evidence as to the contents of those papers. The plaintiff rested, and the defendant moved the court to instruct the jury that on the evidence given the plaintiff could not recover; which instruction the court refused to give, and the defendant excepted. *This was the first exception.*

The company then gave in evidence this and other papers which the wife had handed to the agent as proof of her right to demand the insurance-money. They contained answers by the wife herself in reference to the questions on the blank form, thus:

"QUESTION. *State all the facts regarding cause of death.*

"ANSWER. About the 14th of February, 1867, was taken sick with a severe colic fever; was confined to his house for two days; finally was well enough to attend to business five days succeeding; was again taken sick on the 22d of February, 1867, and from which sickness he died on the 1st of March, 1867.

"QUESTION. *How long has he been sick?*

"ANSWER. In both attacks about ten days.

"QUESTION. *Did he die suddenly, or was his disease after an illness of how many months, and weeks, and days' duration?*

"ANSWER. He died from an acute attack of the congestion of the liver, which produced fever, and from the effects of which he died, to the best of my knowledge and belief."

Besides the statement of the wife, there were the statements by the physician, Dr. Franklin, who had attended Francisco in his last illness; and also of an acquaintance, one Mardis. The physician stated that he had prescribed for the deceased occasionally since 1856, and had "been his physician principally for the last three or four years; his

disease had been indigestion, torpid liver, and colic," and that he died of "acute hepatitis." The acquaintance, Mardis, knew "of his being sick for short periods of a day or two, for about eighteen months previous to his death, of cramps in the stomach."

The company also gave in evidence the application for the policy and the representations therein made, referred to. The answers to the usual questions were given by Mr. Francisco, as agent for his wife. He was asked whether he had ever had liver complaint, whether any disease was suspected, whether he had had at any time disease of the stomach or bowels, whether, during the last seven years, he had any sickness or disease, and if so what were the particulars and what physician had attended him; to all which he answered in the negative.

The defendant then rested. The plaintiff then produced nine witnesses, every one of whom testified that they had known Francisco for longer or shorter terms of time, and that they had never known him to be at all unwell, or more than very slightly so; and that they considered him a healthy man. Four of these were asked whether they could say that the physician, Dr. Franklin's, statements were not correct, and answered that they could not say so; the other five were not questioned on the point.

The plaintiff rested and the evidence was closed. The defendant then prayed the court to instruct the jury that the evidence was not sufficient to entitle the plaintiff to a verdict. The court refused to grant the instruction, and the defendant excepted. *This was the second exception.*

The evidence having been summed up by counsel, the counsel for the defendant offered to the court certain instructions which he desired the court to give to the jury, but the judge refused, saying it was too late to ask instructions, after argument to the jury, to which defendant excepted. *This was the third exception.*

There was a general rule of the court—

"In causes, civil or criminal, tried by a jury, any special charge or instruction asked for by either party must be pre-

sented to the court, in writing, directly after the close of the evidence, and before any argument is made to the jury, or they will not be considered."

The court instructed the jury that it was for them to determine whether the deceased had had any disease or sickness within the meaning of the term as used in the question answered by him; that he might have had a cold or headache so slight as not to constitute sickness or disease within the meaning of the question, to which part of the charge the defendant excepted. *This was the fourth exception.*

The court proceeded to say that the ailment might be so serious as to constitute disease.

The court instructed the jury that it was for them to determine whether the party had been afflicted with any sickness or disease within the proper meaning of those terms, as used in the application; to which part of the charge the defendant excepted. *This was the fifth exception.*

Verdict and judgment having gone for the plaintiff, the case was brought here on the following assignments of error:

I. The court erred in refusing the instructions asked as stated in the first and second exceptions.

II. The court erred in refusing to consider the request for instructions after the close of the argument to the jury, as stated in the third exception.

III. The court erred in charging the jury as stated in the fourth and fifth exceptions.

Messrs. J. M. Carlisle and J. D. McPherson, for the plaintiff in error; a brief of Messrs. Doyle and Barber being filed on the same side:

As to the first exception. The court allowed the plaintiff to recover on evidence that the defendant had made the agreement declared on, and that the person whose life was assured had died, with further proof that papers, in the form of those used by the company in "proof of the just claim of the assured," had been prepared and handed to the agent of the defendant.

Argument for the insurance company.

Now, the plaintiff, by the terms of the policy, was bound to furnish, *first*, "satisfactory evidence of the death of the insured," and *second*, "proof of the just claim of the assured under this policy." The defendant had offered no proof on the latter point when the instruction was asked and refused. The proofs were correct in form but bad in substance. The company was not bound to return them, or ask an explanation, or suggest a mode of explaining away fatal admissions.*

The instruction was asked after the plaintiff had rested, and it was in the nature of a demurrer to the evidence.

As to the second exception. The preliminary proofs offered by the plaintiff are admissions by her, and they show that the deceased, her agent, had given false answers to the questions contained in the application for the policy. If this was so, then, by the very terms of the policy, there could be no recovery. The questions were in writing, the answers in writing, and the plaintiff's admissions in writing; these writings it was the province of the court to construe to the jury.

As to the third exception. The refusal of the judge to consider any instructions asked after argument to the jury was in accordance with a rule of the court, but the right of counsel to submit instructions at any time before the jury leave the box is part of the common law of the land and cannot be taken away by such rule. This is decided by the Supreme Court of California in *People* v. *Williams.*†

As to the fourth and fifth exceptions. The charge of the court was erroneous in the particulars excepted to. There was no evidence before the jury tending to show that the disease specified by Dr. Franklin, or the sickness testified to by Mardis, was not in fact sickness or disease. Certain ordinary acquaintances of Francisco's, not one of whom is shown ever to have crossed his threshold, did not witness the specific attacks of sickness and disease spoken of by Franklin and Mardis, and of course knew nothing of them. They did not

* Campbell v. Charter Oak, 10 Allen, 213; Irving v. Excelsior Ins. Co., 1 Bosworth, 514; Kimball v. Hamilton Ins. Co., 8 Id. 495; Washington Marine Ins. Co. v. Herckenrath, 3 Robinson (N. Y.), 825.

† 32 California, 286.

pretend to deny their occurrence. Their testimony proved nothing more than that Francisco's general health, so far as they knew, was good. When a medical witness says that he has attended a patient for years for a disease which he characterizes as indigestion, torpid liver, and colic, and another witness speaks of the patient as having been subject, for eighteen months or two years prior to his decease, to attacks, lasting a day or two, of cramps in the stomach, and these witnesses are uncontradicted, it is error to intimate to the jury that they are at liberty to find, *from the evidence*, that there was no disease in the case. *Parks* v. *Ross** rules this. The evidence on the point was all in one direction, but under the intimation of the court the jury disregarded it, and *assumed* that certain specific attacks of indigestion, colic, torpid liver, and cramps of the stomach, running through a series of years, were of so trivial a character as not to amount to sickness or disease.

Mr. C. W. Kendall, contra.

Mr. Justice STRONG delivered the opinion of the court.

The evidence that preliminary proof of the death of Francisco and of the justice of the claim of the assured were given to the defendants ninety days before the suit was brought was quite sufficient to go to the jury. The proofs were in forms, blanks for which had been furnished by the insurers, and the forms were filled up in the presence of their agent. He received them without objection, and it does not appear that at any time before the trial of the case it was ever suggested to the assured that the proofs were insufficient, either in form or in substance. Clearly, therefore, it was not for the court to instruct the jury that the plaintiff was not entitled to a verdict. It seems to have been the idea of the defendants that the statements of the witnesses by whom the preliminary proofs were made did not establish the justice of the plaintiff's claim. But whether they did or not was a question which the court had no right to determine as a conclusion of law. They furnished, at

* 11 Howard, 378.

least, some evidence that the claim was just, and this they would have furnished had they contained nothing more than averments that the defendants had agreed to insure, and that the person whose life was insured had died. The first assignment of error is, therefore, not sustained.

The second is equally without merit. After the case had been summed up, and when the court was about to charge the jury, the defendants offered to submit prayers for instructions, but the court refused to receive them, assigning as a reason that the offer was too late. This is alleged to have been an error. What the prayers were, whether the instructions asked were pertinent to the case or not, or whether they could rightfully have been given had they been received, we are not informed. They were not incorporated in the bill of exceptions, and they do not appear in the record. But, assuming that they were such as the court ought to have given had they been presented in time, there was no error in refusing to receive them after the case had been argued to the jury. The rule of the court then existing was as follows: "In causes, civil or criminal, tried by a jury, any special charge or instruction asked for by either party must be presented to the court, in writing, directly after the close of the evidence and before any argument is made to the jury, or they will not be considered." This is a reasonable rule, intended to guard as well the court as the opposite party against sudden surprise. It does not deprive either party of a right to the opinion of the court upon any material propositions which he may desire to have presented to the jury. It merely regulates the exercise of that right. The rule exists in very many courts, and it has been found necessary in the administration of justice. No doubt a court may, notwithstanding the rule, in its discretion, receive prayers for instructions even after the general charge has been given to the jury, but neither party can claim as a right a disregard of the ordinary rules of practice in the court. There is nothing inconsistent with this to be found in the case cited.* On the contrary, whether a court shall

* People v. Williams, 32 California, 280.

enforce such a rule, or depart from it, is treated in that case as a matter resting in the discretion of the court. That it is competent for courts to adopt such a rule has often been decided, and once, at least, if not oftener, in California.*

The remaining errors have been assigned to the charge of the court. The principal defence set up at the trial was that in the application for insurance false answers had been given to the questions propounded by the defendants. Those questions were, in substance, whether the person whose life was proposed for insurance had had certain diseases, or, during the next preceding seven years, any disease, and the answers given were that he had not. It was in reference to this that the court instructed the jury it was for them to determine from the evidence whether the person whose life was insured had, during the time mentioned in the questions propounded on making the application, any affliction that could properly be called a sickness or disease, within the meaning of the term as used, and said, "for example, a man might have a slight cold in the head, or a slight headache, that in no way seriously affected his health or interfered with his usual avocations, and might be forgotten in a week or a month, which might be of so trifling a character as not to constitute a sickness or a disease within the meaning of the term as used, and which the party would not be required to mention in answering the questions. But again, he might have a cold or a headache of so serious a character as to be a sickness or disease within the meaning of those terms as used which it would be his duty to mention, and a failure to mention which would make his answer false."

There is no just ground of complaint in this instruction, either considered abstractly or in its application to the evidence in the case. It was, in effect, saying that substantial truth in the answer was what was required. If, therefore, the defendants have been injured it was by the verdict of the jury rather than by any error of the court.

JUDGMENT AFFIRMED.

* People v. Sears, 18 California, 635.

APPENDIX.

THE twenty-fifth section of the Judiciary Act of 1789 and the second section of the act of 1867, much similar to it, being referred to in the body of this book more than once, are here given. Words in the former act omitted in the latter, or words in the latter not in the former, are here put in brackets; and words variant in the two acts in italics.

JUDICIARY ACT OF 1789.

[1 STAT. AT LARGE, 85.]

SECTION 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court [of law or equity] of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity,

OR where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or *exemption* specially set up or claimed by either party, under such [clause of the said] Constitution, treaty, statute, or commission,

JUDICIARY ACT OF 1867.

[14 STAT. AT LARGE, 385.]

SECTION 2. *And be it further enacted*, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity,

OR where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or *immunity* especially set up or claimed by either party under such Constitution, treaty, statute, commission [or authority],

May be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *Circuit Court*, and the proceeding upon the reversal shall also be the same, except that the Supreme Court [instead of remanding the cause for a final decision as before provided] may, at their discretion [if the cause shall have been once remanded before], proceed to a final decision of the same and award execution. [But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the beforementioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.]

May be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *court of the United States;* and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution [or remand the same to an inferior court]. . . .

INDEX.

ADMIRALTY. See *Prize; Practice*, 15.

ANSWER IN CHANCERY.

A decree reversed as made on evidence not competent, and in the face of answers responsive to the bill. *Moore* v. *Huntington*, 417.

APPEAL. See *Practice*, 7, 15, 19, 20; *Supersedeas*.

1. When a proceeding below is, in its essential nature, a foreclosure of a mortgage in chancery, an appeal is the only proper mode of bringing it to the Supreme Court. *Marin* v. *Lalley*, 14.
2. In prize cases, wherever it appears that notice of appeal or of intention to appeal to the Supreme Court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to the Supreme Court whenever the purposes of justice require it. *The Nuestra Señora de Regla*, 29.
3. Where the Circuit Court of the United States proceeds to exercise jurisdiction under the twenty-third section of the act of 31st May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," an appeal will lie to the Supreme Court from its final decree. *Ex parte Warmouth*, 64.
4. That court has no power to issue the writ of prohibition in such a cause until such appeal is taken. *Ib.*
5. Where the claim on a fund in the Registry of the Admiralty of several mortgages secured in a body by one mortgage, exceeds $2000, an appeal to the Supreme Court will lie by the mortgagees in a body, though the claim of no one of them exceed the said sum. *Rodd* v. *Heartt*, 354.

APPEARANCE.

When a defendant has filed a plea to the merits, and afterwards, by leave of the court, withdraws his plea, that does not withdraw his appearance, and he is still in court so as to be bound personally by a judgment rendered against him in the action. *Eldred* v. *Bank*, 545.

ARMY OFFICER.

1. One who shows that he received a commission from the proper source, and who serves and is recognized as such officer by his superiors until his regiment is mustered out, and who presented himself at the proper time and place to be mustered in, and was refused, makes out a *prima*

ARMY OFFICER (*continued*).

facie case for full pay under the joint resolution of Congress of July 26th, 1866, "for the relief of certain officers of the army." *United States* v. *Henry*, 405.

2. It does not rebut this *primâ facie* case to prove that the officer who refused to muster him in, *alleged* that he was not entitled to such muster because the *company* to which he was assigned as lieutenant was below the minimum in numbers. *Ib.*

ASSIGNMENT OF ERRORS.

Must be made as the rules of court require, or the judgment will be affirmed. *Ryan* v. *Koch*, 19.

AUTHORITIES, JUDICIAL. See *Precedent, Value of.*

BANKRUPT ACT. See *Fraudulent Conveyance.*

1. Under the thirty-fifth and thirty-ninth sections of the, more than passive non-resistance in an insolvent debtor, is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence. *Wilson* v. *City Bank*, 473.
2. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the Bankrupt law. *Ib.*
3. Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act. *Ib.*
4. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment. *Ib.*
5. Very slight circumstances, however (the value of which must be judged of in each case as it arises), which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, or to defeat the operation of the act, may, by giving color to the whole transaction, render the lien void. *Ib.*
6. The twentieth section of the Bankrupt Act was not intended to enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized. *Sawyer* v. *Hoag*, 610.
7. Where personal property has been sold by one insolvent and immediately afterwards decreed a bankrupt, without any change of possession, and is thus void under the rule in *Twyne's Case* by the laws of the State where the transfer is made, the assignee in bankruptcy may pursue it, and, as auxiliary to its recovery, ask that the sale by the bankrupt be annulled. *Allen* v. *Massey*, 352.

BILL IN EQUITY. See *Laches; Parties.*

BILL OF LADING.

Under one to deliver nuts in bags and boxes "in good order and condition, dangers of the seas, fire, and collisions excepted," a ship held liable for damage done to nuts marked "in the cabin state-room," and stowed in the hold on a voyage from San Francisco to New York,

BILL OF LADING (*continued*).

it being shown on the trial, by parol evidence (held, rightly received), to be the almost invariable practice to carry them in the cabin or in the cabin state-rooms in order to guard against injury, extremely liable to happen to them when stowed in the hold. *The Star of Hope*, 651.

BREACH OF CONDITION.

1. Grantor can alone take advantage of. *Holden* v. *Joy*, 211.
2. What amounts to a condonation of. *Ib.*

"CERTIFICATE OF DEPOSIT." See *Internal Revenue*, 5.

"CHECK." See *Internal Revenue*, 1, 5.

CHEROKEES. See *Breach of Condition; Indian Tribes.*

The treaty of the United States with them, of the 29th December, 1835, and the supplemental article thereto of April 27th, 1868, considered at length, and the treaty declared to have made a valid sale to them of the "Cherokee Neutral Lands;" and the sale to one Joy pursuant to the supplemental article declared to have passed a good title to Joy. *Holden* v. *Joy*, 211.

CIVIL RIGHTS. See *Railroad Travel.*

COLLECTOR. See *Smuggling; Trespass.*

COMMON CARRIER. See *Railroad Travel.*

1. Cannot stipulate for exemption from responsibility for the negligence of himself or his servants. *Railroad Company* v. *Lockwood*, 357.
2. The rule applies to the case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose. *Ib.*

CONFIDENTIAL RELATION. See *Laches*, 2.

CONSTITUTIONAL LAW. See *Judicial Comity*, 2.

1. A municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues. *United States* v. *Railroad Company*, 322.
2. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit. *Board of Public Works* v. *Columbia College*, 521.
3. No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. *Ib.*
4. "Police Law," passed by a State, distinguished from a "Regulation of Commerce," and sustained on the distinction between the two. *Railroad Company* v. *Fuller*, 560.

CONSTRUCTION, RULES OF.

I. As applied to Statutes. See *Indictment.*

1. If the provisions of a special charter or a special authority derived from the legislature, can reasonably well consist with general legislation

CONSTRUCTION, RULES OF (*continued*).

whose words are not absolutely harmonious with it, the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case. *State* v. *Stoll*, 425; and see *Ex parte Atocha*, 489.

2. Where a State had publicly promised that the notes of a bank in which it was the sole stockholder, and for whose bills it was liable, should be taken in payment of taxes and all other debts due to the State, and so impressed the credit of the State upon the notes. *Held*, that when the State afterwards intended to terminate this obligation (as it could do upon reasonable notice as to after-issued bills), it was bound to do it openly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be a proper one for the purpose, so it was not to be imputed. *State* v. *Stoll*, 425.

II. As applied to Contracts. See *Interpretation of Contract.*

CONTRACT. See *Offer.*

1. What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was induced by the conduct or declarations of the other party. *Bank* v. *Kennedy*, 19; and see *Bailey* v. *Railroad Company*, 97.
2. Where the validity of a contract made by an agent of the government is disputed by the government, and a commission, appointed by the government to pass on its validity reports, after inviting parties interested to appear before it, that the contract be confirmed to a partial extent and on conditions, or otherwise be held null, and the other party acts after this upon the conditions prescribed—*Held*, that his action is voluntary and that the original contract is modified. *Mason* v. *United States*, 67.
3. So where a claim is disputed by the government, and the claimant accepts a certain sum in settlement thereof and gives a receipt in full therefor, a subsequent action in the Court of Claims for any residue asserted to be due is barred. *Sweeny* v. *United States*, 75.
4. May be implied to restore proceeds (and the fraud of the act waived), where one has unlawfully taken and sold bonds belonging to another; the amount due being capable of ascertainment by computation, and being the principal and interest of the bonds taken and sold. *Allen* v. *United States*, 207.
5. Where, after a contract to do certain work within a time fixed has been completely entered into, the party for whom the work is to be done requests certain alterations in the work, to effect which necessarily requires a considerably longer time, the request to make such alterations implies such a reasonable extension of the time as is requisite to make them, and if the work be done within that reasonable time and the person ordering it was aware of the progress of the work and gave no notice that he would refuse to accept it unless done in the time originally limited, he is bound to take it when done. The doctrine applied to a government contract. *Manufacturing Company* v. *United States*, 592.

CONTRIBUTORY NEGLIGENCE. See *Infant.*

COUNSEL FEES.

Before a commissioner on the settlement of damages on an award of restitution, disallowed as excessive and unwarranted. *The Nuestra Señora de Regla*, 29.

COURT AND JURY.

1. The rule of law that the interpretation of written instruments is a question of law for the court, is applied with full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful, does not relieve the court of this duty, or make the question one of fact for the jury. *Goddard* v. *Foster*, 123.
2. It is not error for a court, leaving to the jury the credibility of the testimony and their belief of certain material facts, to instruct the jury that they must, if they so believe, find for one party, though this may be all that is in contest. *Stitt* v. *Huidekopers*, 384.
3. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury. *Railroad Company* v. *Stout*, 657; and see *Packet Company* v. *McCue*, 508.
4. Whether a party is affected with "sickness or disease" within the meaning of the questions put to him prior to the issue of a life insurance policy, is a question, when medical testimony is one way and that of acquaintances another, for the jury. *Life Insurance* v. *Francisco*, 672.
5. So are the answers, written out in the presence of the insurer's agent under the obligation, in the policy, of the representatives of the assured, to furnish "due proof of the just claim of the assured;" if the assurer have received and kept them without objection to their sufficiency. *Ib.*

COURT OF CLAIMS. See *Set-off*, 2.

1. Claims under treaty stipulations are excluded from the general jurisdiction of the Court of Claims conferred by the acts of Congress of February 24th, 1855, and March 3d, 1863; and when jurisdiction over such claims is conferred by special act, the authority of that court to hear and determine them, and of this court to review its action, is limited and controlled by the provisions of that act. *Ex parte Atocha*, 439.
2. Accordingly a decision of the Court of Claims, made under the act of February 14th, 1865, "for the relief of Alexander J. Atocha," not giving an appeal, held final. *Ib.*
3. Since the passage of the act of March 3d, 1863, amending the act establishing the Court of Claims, objection cannot be made that a set-off set up by the United States is unliquidated; the fifth section of that act covering this class of demands. *Allen* v. *United States*, 207.

CRIMINAL LAW. See *Embezzling Public Money; Indictment.*

CROSS-EXAMINATION. See *Witness*, 2.

CUSTOMS. See *Smuggling; Navigation Laws.*

DEPOSITION.

1. A notice, without date, to take depositions at a time specified, "in the *city* of Guilford, State of Maine," insufficient to let in depositions taken in "the *town* of Guilford;" it not appearing that the town and city were the same and the defect not being cured by attendance of the opposite party. *Knode* v. *Williamson*, 586.
2. Where a notice to take depositions at a place specified, informed the opposite party that they would be taken on a day named, and that the taking would be adjourned "from day to day until completed," and, a portion of the witnesses, having been examined (at whose examination the opposite party with his counsel attended), the taking of the examination of the others was adjourned until the next day, when it was again adjourned until the next succeeding day, and so on, from day to day till a particular day, when the taking of the testimony was completed in the absence of both the opposite party and his counsel. *Held*, that the notice was sufficient *Ib.*

DES MOINES RIVER GRANTS.

1. The history given of the legislation of the land grants for the improvement of the Des Moines River, and of the grants for railroad purposes, which have been supposed to conflict, and the decision in *Wolcott* v. *The Des Moines Company* (5 Wallace, 681), and *Reily* v. *Welch* (MS.), namely, "that the title to those lands never passed to the railroad company by the grant under which it claimed," solemnly reaffirmed in three distinct cases. *Williams* v. *Baker*, 144; *Cedar Rapids Railroad Co.* v. *Des Moines Navigation Co.*, *Ib.*; *Homestead Company* v. *Valley Railroad*, 153.
2. Nor did any railroad company, for whose benefit the act of Congress of May 15th, 1856 (11 Stat. at Large, 9), was made, or their grantees, as respected any lands granted by the said act of May 15th, 1856, or by the act of the legislature of Iowa, passed July 14th, 1856, become *cestui que trusts* or entitled otherwise to any portion of what are called the Indemnity Lands, which were granted by the act of Congress of July 12th, 1862. *Homestead Company* v. *Valley Railroad*, 153.

"DRAFT." See *Internal Revenue*, 5.

EMBEZZLING PUBLIC MONEY. See *Indictment.*

1. No exception or proviso of any kind is contained in the act of Congress of August 6th, 1846 (9 Stat. at Large, 63), making a paymaster in the army who embezzles public money guilty of felony. *United States* v. *Cook*, 168.
2. Therefore, a statute of limitations cannot be taken advantage of by demurrer. *Ib.*
3. The thirty-second section of the act of April 30th, 1790 (sometimes called the Crimes Act), enacts the only limitation applicable to the offence of a paymaster of the army indicted for such embezzlement. *Ib.*

EQUITABLE LIEN. See *Vendor's Lien.*

EQUITY. See *Laches; Parties; Partnership.*

1. Capital stock or shares of a corporation—especially the unpaid subscriptions to such stock or shares—constitute a trust fund for the benefit of the general creditors of the corporation, and this trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith. *Sawyer* v. *Hoag, Assignee*, 610.
2. Equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property. *Board of Public Works* v. *Columbia College*, 621.
3. A decree in, reversed, as made on evidence not competent and in the face of answers responsive to the bill. *Moore* v. *Huntington*, 417.
4. Where a cross-bill and answers are filed in a case, and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them. *Ib.*

ERROR. See *Court and Jury; Practice*, 11–14.

ESTOPPEL. See *Recitals.*

This subject largely investigated, and the nature and effect, extent and limits of estoppels, both legal and equitable, defined. *Branson* v. *Worth*, 32.

EVIDENCE. See *Deposition; Estoppel; Judgment; Necessaries in a Foreign Port*, 1; *North Carolina*, 1; *Practice*, 1, 3; *Res Judicata*, 2.

1. Conversations occurring during the negotiation of a loan, or other transaction, as well as the instruments given or received, being part of the *res gesta*, are original evidence and competent to show the nature of the transaction, and the parties for whose benefit it was made, where that fact is material. *Bank* v. *Kennedy*, 19.
2. Where the cashier of a bank effects a loan, and it becomes material to ascertain whether it was made for his own account or for the use of the bank, evidence of the negotiation and circumstances may be given for that purpose, whatever may be the form of the securities given or received, when the latter are introduced only collaterally in the cause. *Ib.*
3. When papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which they were made, and the reason why they were made in a particular form, may be explained by parol evidence. *Ib.*
4. The purpose or quality of an act may be stated by a witness who was present and cognizant of the whole transaction, as whether the delivery of money by one man to another was by way of payment or otherwise. *Ib.*
5. Parol, how far received to explain a bill of lading. *The Star of Hope*, 651.
6. Parol, inadmissible to show how all the parties in interest understood a long and rather intricate transaction, from its commencement to its

EVIDENCE (*continued*).
consummation; the same being all in writing. *Bailey* v. *Railroad Company*, 96; and see *Bank* v. *Kennedy*, 19.
7. Evidence of fraud, not required to be more direct and positive than that of facts and circumstances tending to the conclusion that it has been practiced. *Rea* v. *Missouri*, 532.
8. A memorandum found upon the record of a patent and put there by some unknown person eight years after the patent had issued is inadmissible to contradict the record. *Branson* v. *Worth*, 82.
9. Evidence of a vendor of land, being positive, is sufficient to rebut a presumption, arising from taking a note with surety for the payment of the purchase-money of the land, that the vendor's lien had been displaced. *Cordova* v. *Hood*, 1.
10. A decree in equity reversed as made on evidence not competent and in the face of answers responsive to the bill. *Moore* v. *Huntington*, 417.
11. On a question by a creditor of A. of a fraudulent assertion by B., of ownership of goods levied on as A.'s, any statements made by B. in the absence of C., which are afterwards assented to by the latter or were part of the *res gesta*, are evidence. *Rea* v. *Missouri*, 532.
12. Ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative. *Stitt* v. *Huidekopers*, 384.
13. When one party gives notice to another to produce on trial a written instrument, and the party who so receives the notice produces and offers to verify it by his oath, the other party cannot refuse to use that paper and introduce a *copy* in the first instance, on the allegation that the first is not genuine, although he might show wherein it was erroneous or defective after it was once introduced. *Ib.*
14. Although a written agreement between persons not parties to the suit may, as a general rule, be contradicted or explained by oral testimony, this does not apply to an attempt to make good by parol evidence a contract which the law requires to be made in writing to make it valid. *Ib.*
15. In an action of ejectment, a letter of the plaintiff's grantor, written to the ancestor of the defendant, is not competent evidence to show that the ancestor entered into possession under the license of the plaintiff's grantor, without some evidence that such letter was received or acted on about the time of such entry by the ancestor. *Smiths* v. *Shoemaker*, 630.
16. The mere fact that the date found on the letter corresponds with the time of such entry, is not of itself sufficient to show that the letter was written at that time. *Ib.*
17 Where the purpose is to impeach a witness, the proper question is what is the general "reputation" for truth of the witness? rather than what is his general "character" for truth? *Knode* v. *Williamson*, 587.
18. The extent to which a cross-examination is carried not reviewable on error. *Rea* v. *Missouri*, 532.

FINAL DECREE. See *Supersedeas*.
The order of seizure and sale called "executory process," made in Louis-

FINAL DECREE (*continued*).

iana when the mortgage "imports a confession of judgment," is in substance a decree of foreclosure and sale, and therefore a "final decree;" especially when made after objections have been made and heard. *Marin* v. *Lalley*, 14.

FORECLOSURE. See *Appeal*, 1; *Final Decree*.

FOREIGN VESSEL. See *Navigation Laws*.

FRAUD.

1. Evidence of it not required to be more direct and positive than facts and circumstances tending to the inference of it. *Rea* v. *Missouri*, 532.
2. Where a creditor of B. levied on certain goods as B.'s for which C. interposed a claim of ownership, *held* that an intimate personal and business relation between B. and C. having been shown, it was error to instruct the jury that it was immaterial as to the ownership of the goods how C. acquired his means, or whether his exhibit of them was correct or not. *Ib.*

FRAUD ON REVENUE.

A device to avoid the revenue acts, and whose operation does avoid them, is subject to no legal censure if the device be carried out by means of legal forms. *United States* v. *Isham*, 496.

FRAUDULENT CONVEYANCE. See *Fraud*.

Under the statute of frauds of Missouri, a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors. *Allen* v. *Massey*, 352.

GOVERNMENT CONTRACTOR. See *Contract*, 2, 3, 5.

IMPEACHING WITNESS. See *Witness*, 1.

IMPLIED CONTRACT.

Where a person has unlawfully procured and sold securities belonging to another, the principal and interest of which is capable of being ascertained by computation, the owner from whom they have been taken, may waive the fraud in the conversion of the bonds, and claim as on an implied contract. *Allen* v. *United States*, 207.

INCOME TAX. See *Internal Revenue*, 3, 4.

INDIAN TRIBES. See *Cherokees; Breach of Condition*.

Capable of taking as owners in fee simple by purchase from the United States; and a sale to them is properly made by treaty. *Holden* v. *Joy*, 211.

INDICTMENT.

Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defin-

INDICTMENT (*continued*).

ing the offence, that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. But if the language of the section defining the offence is so entirely separable from the exception, that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defence, and to be shown by the accused. *United States* v. *Cook*, 168.

INDORSER. See *Negotiable Paper.*

INFANT.

Need not himself have been free from fault to entitle him to recover damages resulting from the fault of another. *Railroad Company* v. *Stout*, 657.

INSOLVENT CORPORATION. See *Equity*, 1.

INTEREST.

Where allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*. *Goddard* v. *Foster*, 124.

INTERNAL REVENUE. See *Trespass.*

1. The words "memorandum, check," in that part of the schedule of instruments required by the statute of June 30th, 1864 (13 Stat. at Large, p. 298, § 158), to be stamped, which in the printed statute-books are printed with a comma between them, should read, "memorandum-check," with a hyphen instead of a comma. *United States* v. *Isham*, 496.
2. In settling whether an instrument should be stamped or not, regard is to be had to its form, rather than to its operation. Though the form adopted may be a device to avoid the revenue acts, and though it may avoid them, yet if the device be carried out by means of legal forms it is subject to no legal censure. *Ib.*
3. Under the 116th, 119th, and 122d sections of the Internal Revenue Act of June 30th, 1864, as subsequently amended, the interest due or dividends declared by any railroad or canal company, &c., which accrued prior to the 1st of January, 1870, were taxable under the act, though payable on or after the date named. *Barnes* v. *The Railroads*, 294.
4. This tax is a tax on the creditor and not upon the corporation. *United States* v. *Railroad Company*, 322.
5. Under the 110th section of the internal revenue act of 1864, as amended by the act of July 13th, 1866, taxing deposits in banks, an entry made in the depositor's pass-book of a deposit or payment, is "a certificate of deposit," or "check," or "draft" within the meaning of the section. *Oulton* v. *Savings Institution*, 109.
6. Under the proviso to that section, savings banks are not exempt from taxation if they have a capital stock, or if they do any other business than receiving deposits to be lent or invested for the sole benefit of the person making such deposits. *Ib.*

INTERNAL REVENUE (*continued*).

7. The fact that, by an agreement between the savings bank and the depositor, money deposited with the bank shall be reimbursed only out of the first disposable funds that shall come into the hands of the bank after demand, being a regulation adopted but for an emergency, and not such as essentially impairs the just claim of a depositor, does not change the case. *Oulton* v. *Savings Institution*, 109.

8. Under the 20th section of the act of July 20th, 1868, entitled "An act imposing taxes on distilled spirits," &c., in the absence of a distiller's having appealed to the Commissioner of Internal Revenue (as under the 10th section of the act he may do), for the correction of any error made by the assessor in fixing the "true producing capacity" of his distillery, it is lawful for the government to assess and collect, as for a deficiency, the taxes upon the difference between the said "producing capacity" as estimated by the assessor and the amount of spirits actually produced by such distillery, even though the distiller have in good faith reported and paid taxes upon his whole production, and though such production have exceeded 80 per centum of the producing capacity aforesaid. *The Collector* v. *Beggs*, 182.

INTERPRETATION OF CONTRACT.

Not to be governed by what either party to the contract understood or believed, unless such understanding or belief was induced by the conduct or declarations of the other party. *Bank* v. *Kennedy*, 19; and see *Bailey* v. *Railroad Company*, 96.

INTERPRETATION OF LANGUAGE. See *Construction, Rules of.*

JUDGMENT. See *Appearance; Res Judicata.*

On a note or contract operates as a merger of it; and when the judgment is binding personally it can be introduced in evidence, and relied on as a bar to a second suit on the note. *Eldred* v. *Bank*, 545.

JUDICIAL AUTHORITY. See *Precedent, Value of.*

JUDICIAL COMITY. See *Rebellion*, 2.

1. In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of the State, whatever may be the opinion of this court of its soundness. *Walker* v. *The State Harbor Commissioners*, 648; and see *Allen* v. *Massey*, 351.

2. A personal judgment, rendered in one State against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the State where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. *Board of Public Works* v. *Columbia College*, 521.

JURISDICTION. See *Appeal; Constitutional Law*, 2, 8.

I. OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) IT HAS jurisdiction—

1. Under the 25th section of the Judiciary Act, as well as under that of

JURISDICTION (*continued*).

the 5th of February amendatory of it, if it has, beyond all question, decided every question at issue between the parties which it is necessary to decide in order to dispose of the case on its merits, and the State court has not carried out its mandate but in effect evaded it, on a second writ of error to "proceed to a final judgment and award execution." *Tyler* v. *Maguire*, 254.

2. Under the same sections, to review the judgment of a State court when the writ is issued to the highest court of the State in which a decision of the case could be had, even if that court be an inferior court of the State. *Miller* v. *Joseph*, 655.

II. OF THE CIRCUIT COURTS.

(*b*) They HAVE jurisdiction—

3. When objection is taken on the ground of citizenship, provided the parties to whose citizenship the objection is taken be not indispensable parties. *Horn* v. *Lockhart*, 570.

JURY. See *Court and Jury*.

LACHES.

1. Where a bill is filed by a third party to set aside, as fraudulent, completed judicial proceedings, regular on their face—the bill being filed five years after the judicial proceedings which it is sought to set aside have been completed—the cause of so considerable a delay should be specifically set out. And if ignorance of the fraud is relied on to excuse the delay it should be shown specifically when knowledge of the fraud was first obtained *Harwood* v. *Railroad Company*, 78

2. A bill by *cestui que trusts* was dismissed, where all the grounds of action had occurred between twenty and thirty years, and the alleged breach of trust had taken place thirty-seven years before the bill was filed, and the trustee was dead. This, although the *cestui que trusts* were women and the trustee a lawyer, who had married their half-sister. *Hume* v. *Beale's Executrix*, 336.

LANDLORD AND TENANT.

Where a lessee, after letting to another, reserving a rent, has assigned all his "right, title, and interest" in the lease, and "authorized the assignee to sue for, collect, and recover the lease, and the rights to the rent reserved under the same," declaring "it to be distinctly understood" that it is the object and purpose to put the assignee in his "place and stead, so far as concerns his rights under the lease"—the lessee, on a claim against him by the sub-tenant, cannot set up a claim for arrears of rent due to him at the time when he assigned the lease. The transfer has carried them to the assignee. *United States* v. *Hickey*, 9.

LEASE. See *Landlord and Tenant*.

LEGAL TENDER. See *Practice*, 17; *South Carolina*.

"LICENSE TO TRADE." See *Trading with Public Enemy*, 2.

LIEN. See *Vendor's Lien*.

LIFE INSURANCE. See *Court and Jury*, 4, 5.

MANDAMUS.

Against an officer of the government, in the absence of statutory provision to the contrary, abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding or on an order for the substitution of parties. *United States* v. *Boutwell*, 604.

MARINE RISKS.

Distinguished from war risks. *Goodwin* v. *United States*, 515.

MASTER AND SERVANT.

The rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury,—whether a true rule or not,—has no application when one of the persons employed and injured is a boy of tender years employed as a helper under the superintendence of a full-grown man of mature years, and required by the master to obey his orders. *Railroad Company* v. *Fort*, 553.

MEMORANDUM-CHECK. See *Internal Revenue*, 1, 2.

MERGER.

A judgment on a note or contract merges the note or contract, and no other suit can be maintained on the same instrument. *Eldred* v. *Bank*, 545.

MUNICIPAL CORPORATION

Is not subject to taxation by Congress on its municipal revenues. *United States* v. *Railroad Company*, 322.

MUTUAL DEBTS AND CREDITS. See *Set-off*, 1.

NATIONAL BANKS.

1. A receiver of one, appointed by the comptroller of the currency under the fiftieth section of the National Banking Act, may sue for demands due the bank in his own name as receiver, or in the name of the bank. *Bank* v. *Kennedy*, 19.
2. In order to sue for an ordinary debt due the bank, he is not obliged to get an order of the comptroller of the currency. It is a part of his official duty to collect the assets. *Ib.*

NAVIGATION LAWS.

A vessel built in the British Province of Canada, but owned wholly by citizens of the United States, if engaged in transporting the products of Canada into ports of the United States, may be forfeited under the act of March 1st, 1817 (3 Stat. at Large, 351). *The Merritt*, 582.

NECESSARIES IN A FOREIGN PORT.

1. Where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, the presumption of law, in

NECESSARIES IN A FOREIGN PORT (*continued*).

the absence of fraud or collusion, is that they are made upon the credit of the vessel as well as upon that of her owners, and the presumption can be repelled only by proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry. *The Emily Souder*, 667.

2. Liens for such advances have priority over existing mortgages to creditors at home. *Ib.*

NEGLIGENCE. See *Infant; Railroad Travel*, 1.

1. The distinction between "gross" and ordinary, as applied to common carriers, unnecessary. *Railroad Company* v. *Lockwood*, 357.
2. Railroad companies not exempt from responsibility to strangers for injuries arising from their negligence or from tortious acts. *Railroad Company* v. *Stout*, 657.

NEGOTIABLE PAPER.

1. When an indorser of a note has the maker's funds in his hands only as arising from the profits of a business in conducting which he was a partner of the maker, and is simply authorized to apply the funds so in his hands to the payment of notes *at* their maturity, and thus may have parted with them a certain time *after* the maturity,—it is error to take away from the jury the question whether the note was legally presented to the maker for payment, and whether notice of dishonor was legally given to the indorser. *Ray* v. *Smith*, 412.
2. What request the holder may properly in such case make of the court. *Ib.*

NORTH CAROLINA.

1. Under the statutes of, no copy of a registered *copy* of a deed can be read in evidence in place of the original, even if it be proved that the original is lost. *Olcott* v. *Bynum*, 44.
2. There not being in that State any statutory provision relating to express trusts, "manifested and proved," similar to the provision in the seventh section of the Statute of Frauds, such trusts in that State stand as at common law. *Ib.*

NOTICE. See *Deposition; Rebellion*, 8.

1. Where inquiry is a duty the party bound to make inquiry is affected with all the knowledge which he would have got had he inquired. *Cordova* v. *Hood*, 1.
2. Through newspapers not necessary to give effect to a proclamation of the President. It takes effect when signed and sealed with the seal of the United States, officially attested. *Lapeyre* v. *United States*, 191.

NOTICE OF NON-PAYMENT. See *Negotiable Paper.*

NOTICE TO PRODUCE PAPERS. See *Evidence*, 13.

NUTS. See *Bill of Lading.*

OFFER.

1. An offer to sell at a fixed price, whether accompanied with an agency to sell to others or not, may be revoked at any time prior to the acceptance of the offer, unless there is an express agreement on good consideration to accept within a limited time, or when other acts are done which the person making the offer consents to be bound by. *Stitt* v. *Huidekopers*, 384.
2. An offer to take $40,000 in cash is not accepted so as to bind the party by a contract which leaves the buyer at liberty to withdraw by forfeiting a deposit of $10,000, or pay the remainder within sixty days. *Ib.*

OFFICER OF THE ARMY. See *Army Officer.*

OPINIONS OF THE COURT. See *Precedent, Value of.*

1. Where a question brought to this court is wholly one of the weight of evidence, involving no controverted proposition of law, the court will content itself with announcing fully its conclusions upon the evidence. *Harrell* v. *Beale*, 590.
2. May be assisted, in regard to an ancient transaction, by a judgment of another court, upon its sitting at the scene of the transaction, though such judgment be not capable of being pleaded as *res judicata*. *Hume* v. *Beale's Executrix*, 336.

PAROL EVIDENCE. See *Evidence*, 1, 5, 6.

PARTIES. See *Practice*, 18.

1. Where a bill is filed by a third party to set aside, as fraudulent, completed judicial proceedings, regular on their face, the plaintiff in those proceedings should be brought in as a party. *Harwood* v. *Railroad Company*, 78.
2. Where a person sues in chancery as administrator of a deceased partner, to have an account of partnership concerns, alleging in his bill that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties. *Moore* v. *Huntington*, 417.

PARTNERSHIP.

1. On a bill by the representatives of a deceased partner against surviving partners for an account, these last should not be charged with the sum which the partnership assets at the exact date of the deceased partner's death were worth, but only with such sum as by the use of reasonable care and diligence they could get for them in closing the partnership business. *Moore* v. *Huntington*, 417.
2. Nor be charged with the value of real estate of the partnership the title to which is left by the decree charging them in the heirs of the deceased partner. *Ib.*

PATENT.

I. General Principles Relating to.

1. Where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufac-

PATENT (*continued*).

tured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to *use* it anywhere, without reference to other assignments of territorial rights by the same patentee. *Adams* v. *Burke*, 453.

2. The right to the *use* of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation of the right of use within a given locality. *Ib.*
3. In a suit by a patentee, for damages against an infringer, the plaintiff can recover only for actual damages shown by evidence. Accordingly an instruction to award to the plaintiff "such sum as the jury should find to be required to remunerate him for the loss sustained by the wrongful act of the defendants, *and to reimburse him for all such expenditures as have been necessarily incurred by him in order to establish his right*," is erroneous as too broad and vague. *Philp* v. *Nock*, 460.
4. Where a claim in a patent uses general terms of reference to the specification, such as "substantially in the manner and for the purpose herein set forth," although the patentee will not be held to the precise combination of all the parts described, yet his claim will be limited, by reference to the history of the art, to what was really first invented by him. *Carlton* v. *Bokee*, 463.
5. General claims inserted in a reissued patent will be carefully scrutinized, and will not be permitted to extend the rights of the patentee beyond what is shown by the history of the art to have been really his invention. If made to embrace more the claim will be void. *Ib.*
6. One void claim, if made by inadvertence and in good faith, will not vitiate the entire patent. *Ib.*

PERSONAL PROPERTY, SALE OF. See *Fraudulent Conveyance.*

PERSONS OF COLOR. See *Railroad Travel*, 2.

PLEADING. See *Indictment.*

"POLICE LAW."

Passed by a State, distinguished from a "regulation of commerce," and sustained on the distinction between them, characteristic of a "police law." *Railroad Company* v. *Fuller*, 560.

PRACTICE. See *Appeal; Appearance; Court and Jury; Final Decree; Jurisdiction; Mandamus; Parties; Supersedeas; Trespass*, 2; *Witness.*

I. IN THE SUPREME COURT.

(*a*) *In cases generally—*

1. In passing upon the questions presented in a bill of exceptions the Supreme Court will not look beyond the bill itself. Evidence or statements of fact not contained in it, nor made a part thereof, though appended thereto, will not be regarded. *Bank* v. *Kennedy*, 19; *Reed* v. *Gardner*, 409.
2. A judgment will be affirmed when the plaintiff in error files no assignment of errors or brief, as required by the rules of court. *Ryan* v. *Koch*, 19.

PRACTICE (*continued*).

3. Though a party may have taken exception before a trial to the refusal of a court then to suppress a deposition, yet if he allow the deposition to be read on the trial without opposition, he cannot avail himself, in this court, of his previous exception. *Ray* v. *Smith*, 412.
4. When a proceeding below is in its essential nature a foreclosure of a mortgage in chancery (which the order of seizure and sale called "executory process" made in Louisiana, when the mortgage "imports a confession of judgment" is decided here to be), an appeal is the only proper mode of bringing it to the Supreme Court. *Marin* v. *Lalley*, 14.
5. In the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding or on an order for the substitution of parties. *United States* v. *Boutwell*, 604.
6. When a case is one wholly of the weight of evidence, the Supreme Court does not consider itself bound to do more than announce, without assigning reasons, its judgment on it. *Harrell* v. *Beale*, 590.
7. When a court below, on a claim embracing several items, rejects some but allows others, against which allowance the defendant *alone* appeals, the Supreme Court will not give consideration to the items rejected and against whose rejection the plaintiff has not appealed, except so far as may be necessary for a proper understanding of the item allowed. *United States* v. *Hickey*, 9.
8. Extent to which a witness may be examined, not reviewable on error. *Rea* v. *Missouri*, 532.
9. When in an action of ejectment, a letter of the plaintiff's grantor written to the ancestor of the defendant is offered by the plaintiff, to show that the ancestor entered into possession under the license of the plaintiff's grantor—no evidence having been given that the letter was received or acted on about the time of such entry by the ancestor—a general objection below that such letter is a declaration of the grantor of his own rights is sufficient. *Smith* v. *Shoemaker*, 630.
10. If, in the appellate court, the party introducing such a letter relies on any special circumstances as an exception to the rule (as that it was part of the *res gestæ*), that circumstance must appear in the bill of exceptions or by the record in some other manner. The admission will be held to be erroneous unless this appears. *Ib.*
11. When it is argued in such court that an error in the court below worked no injury to the party complaining, the fact that it worked no injury must be made to appear beyond question. If it is only to be seen by a mere preponderance of evidence, and the error is substantiated, the judgment must be reversed. *Ib.*
12. Special circumstances of an alleged misleading of the court and opposite counsel by a statement of counsel, considered as a reason for refusing to reverse a judgment manifestly erroneous, and found to be insufficient. *Eldred* v. *Bank*, 545.
13. A writ of error from the Supreme Court of the United States to review

PRACTICE (*continued*).

the judgment of a State court must be issued to whatever court is the highest court of the State in which a decision of the case could be had, even if that court be an inferior court of the State. *Miller* v. *Joseph*, 655.

14. A writ of error will not lie to review the action of a court in enforcing its reasonable rules. *Life Insurance Company* v. *Francisco*, 672.

(*b*) *In admiralty*—

15. In prize cases, wherever it appears that notice of appeal or of intention to appeal to the Supreme Court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed whenever the purposes of justice require it. *The Nuestra Señora de Regla*, 30.

II. In Circuit and District Courts.

16. Where a cross-bill and answers are filed in a case and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them. *Moore* v. *Huntington*, 417.

17. Where advances for necessaries to a vessel in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may decree the amount in like currency. *The Emily Souder*, 667.

18. When objection is taken to the jurisdiction of the Circuit Court of the United States by reason of the citizenship of some of the parties to a suit, the question is whether to a decree authorized by the case presented they are indispensable parties. If their interests are severable from those of other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. *Horn* v. *Lockhart*, 570.

III. In the District Courts of the United States.

19. A district judge, sitting as the Circuit Court, may allow an appeal from his own decree. *Rodd* v. *Heartt*, 354.

IV. In the Court of Claims.

20. Decisions under special acts not giving appeal, held final. *Ex parte Atocha*, 439.

V. In the highest Court of a State.

21. It is not error in an appellate State court giving judgment against an appellant to include in the judgment sureties in the appeal and writ of error bond. By signing the bond they become voluntary parties to the bond and subject themselves to the decree. *Moore* v. *Huntington*, 417.

PRECEDENT, VALUE OF.

A particular decision held not weakened as an authoritative exposition of the law by an alleged collusion of the parties to the suit; it being shown by the record that all the questions in the case were fully argued by other parties who intervened, and that the court maturely and deliberately considered the question which they were now asked to reconsider. The court declares that it does not look with approval upon a labored effort to prove by testimony that its judgment was ob-

PRECEDENT, VALUE OF (*continued*).
tained by collusion, when the judgment is cited in another case only to establish principles of law, and not by way of evidence or estoppel. *Williams* v. *Baker*, 144.

PREFERRED AND COMMON STOCK.
A series of agreements, &c., in regard to such sorts of stock interpreted in a case, special in character, of an embarrassed corporation, seeking to extricate itself from its difficulties. *Bailey* v. *Railroad Company*, 96.

PRESUMPTION. See *Necessaries in a Foreign Port*, 1.

PRINCIPAL AND AGENT. See *Railroad Travel*, 1.

PRIZE.
A Spanish-owned vessel on her way from New York to Havana put in distress, by leave of the admiral commanding the squadron, into Port Royal, S. C., then in rebellion, and blockaded by a government fleet, and was there seized as prize of war and used by the government. . . . She was afterwards condemned as prize, but ordered to be restored. She never was restored. Damages for her seizure, detention, and value being awarded. *Held*, that clearly she was not lawful prize of war or subject of capture; and that her owners were entitled to fair indemnity, though it might be well doubted whether the case was not more properly a subject for diplomatic adjustment than for determination by the courts. *Nuestra Señora de Regla*, 29.

PROCLAMATION OF THE PRESIDENT.
Takes effect when signed by the President and sealed with the seal of the United States officially attested. Publication in newspapers not necessary. *Lapeyre* v. *United States*, 191.

PRODUCTION OF PAPERS ON NOTICE. See *Evidence*, 18.

PROHIBITION. See *Appeal*, 4.

PUBLIC LAW.
What constitutes trading with an enemy and when done through an agent. *United States* v. *Lapene*, 601.

QUESTIONS OF LAW AND FACT. See *Court and Jury*.

RAILROAD TRAVEL.
1. A railroad corporation managed on the joint account of a receiver of part of it and the lessees of the remaining part, *held* liable for injuries committed, by a servant of the parties working it, upon the person of a passenger whom such servant improperly expelled from a car, into which the passenger had entered; the railroad corporation having allowed tickets to be issued in its own name, in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad corporation was not itself managing the road. *Railroad Company* v. *Brown*, 445.
2. An act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted also that "no person shall be excluded from the cars on account of color." *Held*, that this

RAILROAD TRAVEL (*continued*).
meant that persons of color should travel in the same cars that white ones did, and along with them in such cars. *Railroad Company* v. *Brown*, 445.

REAL ESTATE. See *Des Moines River Grants; Indian Tribes; Landlord and Tenant; Resulting Trust; Estoppel; Rule in Shelley's Case; Rebellion, The*, 3; *Taxes; Trustee's Sale; Use and Occupation; Vendor's Lien.*

REBELLION, THE. See *Trading with Public Enemy.*

1. To a suit by legatees to compel an executor to account for moneys received by him from sales of property belonging to the estate of his testator, and to pay to them their distributive shares, it is no answer for the executor to show that he invested such funds in the bonds of the Confederate government by authority of a law of the State in which he was executor, and that such investment was approved by the decree of the probate court having settlement of the estate. *Horn* v. *Lockhart*, 571.
2. The acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. *Ib.*
3. Judicial proceedings during the war of the rebellion, within lines of the Federal army, by a private person on a mortgage, ending in a judgment and sale of mortgaged premises, against one who had been expelled by the military authority of the United States into the so-called Confederacy, and who had no power or right to return to his home during the rebellion, held null, and a judgment which refused to vacate them reversed. *Dean* v. *Nelson* (10 Wallace, 172) affirmed. *Lasere* v. *Rochereau*, 437.

RECEIVER OF NATIONAL BANK. See *National Banks.*

RECITALS. See *Estoppel.*
In a private act of legislature bind none but those who apply for the act. *Branson* v. *Worth*, 32.

REGISTRY LAWS. See *Navigation Laws.*

"REGULATION OF COMMERCE."
One, distinguished from a "police law;" and the latter, passed by a State, sustained as not being the former. *Railroad Company* v. *Fuller*, 560.

RENT. See *Landlord and Tenant.*

RES GESTÆ. See *Evidence*, 1, 11.

RES JUDICATA. See *Judgment.*

1. Although a former suit about the same subject-matter as a later one may not operate strictly as *res judicata*, yet it may well be referred to when it was heard on the scene of the transaction complained of, and when it relates to a transaction forty years old, as an element by

RES JUDICATA (*continued*).

which a conclusion at a later day in accordance with its result may be assisted. *Hume* v. *Beale's Executrix*, 336.

2. A personal judgment, rendered in one State against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the State where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. *Board of Public Works* v. *Columbia College*, 521.

RESULTING TRUST.

A resulting trust of land does not arise in favor of one of two joint purchasers, unless his part is some definite portion of the whole, and what money he pays is paid for some aliquot part of the property, as a fourth, third, or a moiety. Nor can it arise in any case for more than the money actually paid; nor be created by advances or funds furnished after the time when the purchase is made. *Olcott* v. *Bynum*, 44.

RULE IN SHELLEY'S CASE.

Held not to apply to a case where a testator gave his estate, both real and personal, to his son, R. T., "during his natural life, and after his death *to his issue, by him lawfully begotten of his body*, to such issue, their heirs and assigns forever;" with devises over, in case R. T. should die without lawful issue. *Daniel* v. *Whartenby*, 689.

RULE OF COURT. See *Practice*, 14.

One that "in causes tried by a jury, any special charge or instruction asked for by either party, must be presented to the court in writing, directly after the close of the evidence, and before any argument is made to the jury, or it will not be considered," is a reasonable rule; and the enforcement or disregard of it is matter of discretion with the court making it. *Life Insurance Company* v. *Francisco*, 673.

SALE. See *Fraudulent Conveyance; Trustee's Sale.*

SAME CAUSE OF ACTION. See *Res Judicata.*

Judgment on a note or contract operates as a merger of it, and when the judgment is binding personally, it can be introduced in evidence and relied on as a bar to a second suit on the note. *Eldred* v. *Bank*, 545.

SERVICE OF WRIT. See *Judicial Comity*, 2; *Rebellion*, 3.

1. Under a statute requiring that a writ shall be served by delivering a copy to the defendant, or by leaving the same with some white person of the family, "*at* the dwelling-house of such defendant;" a leaving of the declaration with such a white person of the family when he is at a distance of one hundred and twenty-five feet from the house and in a corner of the yard of the house, is not good. *Kibbe* v. *Benson*, 624.

2. The charter of a railroad company, authorized service of process "on any director." On a suit brought, the marshal made return of service, July 6th, 1868, on J. S., "*reputed* to be one of the directors." The record showed that on the 5th of May, 1866, J. S. was, in fact,

SERVICE OF WRIT (*continued*).

one of the directors. *Held*, sufficient service, in the absence of proof, that J. S. was not one of the directors at the time of service; and under some special circumstances. *Railroad Company* v. *Brown*, 445.

SET-OFF.

1. A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors. *Sawyer* v. *Hoag*, 610.
2. A claim by the United States for the proceeds of bonds unlawfully procured from it by a person insolvent, and sold, consisting of the principal and interest of the bonds, and being thus capable of ascertainment, is sufficiently liquidated, though it have never been judicially determined, to be the subject of set-off. *Allen* v. *United States*, 207.

SHIPS. See *Bill of Lading; Necessaries in a Foreign Port.*

SMUGGLING.

Under the fifteenth section of the act of July 18th, 1866, providing for the sale of property used in smuggling goods into the United States, the expense of keeping which would reduce the proceeds of its sale, the collector may publicly advertise it for sale at once, on seizure, and proper certificate by appraisers of its value and character, and, after not less than one week's notice, sell it. *Conway* v. *Stannard*, 398.

SOUTH CAROLINA.

Different sections of the statutes of the State of, relating to its banks construed, and the bills of the Bank of the State, though issued after December 20th, 1860, and not paid in specie, held to have been a legal tender for the payment of taxes due the State in 1870. *State* v. *Stoll*, 425.

STAMPS. See *Internal Revenue*, 2.

STATUTE OF FRAUDS. See *North Carolina*, 2.

STATUTES OF LIMITATION.

In construing them, they must, so far as they affect rights of action in existence when the statutes are passed, be held, in the absence of contrary provision, to begin when the cause of action is first subjected to their operation. *Sohn* v. *Waterson*, 596.

STATUTES OF THE UNITED STATES.

The following, among others referred to, commented on and explained:

1789.	September 24th.	See *Jurisdiction.*
1790.	April 30th.	See *Embezzling Public Money.*
1792.	December 31st.	See *Navigation Laws.*
1797.	March 3d.	See *Set-off.*
1804.	March 26th.	See *Embezzling Public Money.*
1807.	February 24th.	See *Trespass.*
1817.	March 1st.	See *Navigation Laws.*
1836.	July 4th.	See *Patent.*
1846.	August 6th.	See *Embezzling Public Money.*

STATUTES OF THE UNITED STATES (*continued*).

1846.	August 8th.	See *Des Moines River Grants.*
1855.	February 24th.	See *Court of Claims.*
1856.	May 15th.	See *Des Moines River Grants.*
1861.	July 13th.	See *Trading with the Public Enemy.*
1862.	July 12th.	See *Des Moines River Grants.*
1863.	March 3d.	See *Court of Claims; Army Officer.*
1864.	June 3d.	See *National Banks.*
1864.	June 30th.	See *Internal Revenue*, 7.
1864.	July 2d.	See *Trading with the Public Enemy.*
1866.	June 15th.	See "*Regulation of Commerce.*"
1866.	July 13th.	See *Smuggling.*
1866.	July 26th.	See *Army Officer.*
1867.	February 5th.	See *Jurisdiction.*
1867.	March 2d.	See *Bankrupt Act; Internal Revenue.*
1868.	July 20th.	See *Internal Revenue*, 8.
1870.	May 31st.	See *Appeal*, 3.
1870.	July 8th.	See *Patent.*

STOCKHOLDERS IN INSOLVENT CORPORATIONS. See *Equity*, 1; *Set-off*, 1.

SUPERSEDEAS.

1. Where the Circuit Court "decrees" that a fund in court belongs to certain persons named, and that their claims be paid, and (the fund not being large enough to pay all the persons in full) orders a distribution by a commissioner, in accordance with the principles laid down by the court, and on a table of distribution being reported by the commissioner, recites that the commissioner had submitted a distribution based *upon the decree* theretofore *made* by the court, and then "orders and decrees" that the fund be distributed according to it, the "decree" may be considered as of either date as respects the matter of a supersedeas. *Rodd* v. *Heartt*, 354.
2. As respects the question whether the appeal was in time to operate as a supersedeas, the case is regulated by the act of June 1st, 1872, which allows sixty days, and not by the Judiciary Act of 1789. *Ib.*

SURETIES IN APPEAL. See *Practice*, 21.

TAXES. See *Internal Revenue*, 3-8; *South Carolina.*

1. A party who has no title to lands cannot acquire one by mere payment of taxes on them. *Homestead Company* v. *Valley Railroad*, 153.
2. A party by paying taxes which another party ought to pay, but does not pay, cannot make such second party his debtor by having stepped in and paid the taxes for him, without being requested so to do. *Ib.*

TENDER, LEGAL. See *Practice*, 17; *South Carolina.*

TEXAS. See *Vendor's Lien*, 5.

TITLE TO LANDS. See *Rebellion*, 3.

Cannot be acquired by the mere payment of taxes. *Homestead Company* v. *Valley Railroad*, 153.

TRADING WITH PUBLIC ENEMY.

1. What constitutes. May be through an agent. *United States* v. *Lapene*, 601.
2. A sale made without "a license to trade," by a loyal citizen of the United States, on the 6th of March, 1865, when Savannah was occupied by the Federal troops, to a loyal citizen of New York, of cotton which had been returned by the owner, registered, and taken into possession by the United States, and sent for sale to New York under the Captured and Abandoned Property Act, *held* void, although the bill of sale of the cotton authorized the attorney of the vendors to receive the proceeds of sale and pay them to the vendees, and was thus argued to have been not a sale of the cotton at Savannah, Georgia, but a sale of claim in Washington, D. C. *Cutner* v. *United States*, 517.
3. *Held* further, the full consideration-money of the purchase having been paid, that the vendor could not sustain a suit in the Court of Claims for the proceeds of the cotton, for the use of the vendee. *Ib.*

TRANSFER OF LEASE, EFFECT OF. See *Landlord and Tenant.*

TRAVEL ON RAILROAD. See *Railroad Travel.*

TRESPASS.

1. Will not lie against a collector of internal revenue for improperly seizing and carrying away goods as forfeited, where, on information afterwards filed, the marshal has returned that *he* has seized and attached them, and where after a trial absolving them a certificate of probable cause has been granted under the eighty-ninth section of the act of February 24th, 1807, and where the owner of the goods has never made any claim of the collector for them except by bringing the action of trespass. *Averill* v. *Smith*, 82.
2. The claimant of the goods after a trial where probable cause has been certified, ought to move the court for the necessary orders to cause the property to be returned to the rightful owners, if the court have itself omitted to make such an order. It is not the duty of either the marshal or collector to do so. *Ib.*

TRUST. See *North Carolina*, 2; *Resulting Trust; Trustee's Sale.*

TRUSTEE'S SALE.

1. A deed of trust with power of sale (a deed, therefore, in the nature of a mortgage), provided that money should be paid in three equal instalments, and that in default of payment of any one "that may grow due thereon," all the mortgaged premises might be sold and a deed of the premises made to the purchaser, and that it should be lawful for the trustee "out of the money arising from such sale to retain the principal and interest which shall then be due" . . . rendering the overplus to the mortgagor. *Held* (*the property being incapable of advantageous sale in parts*), that when one instalment fell due, the trustee had a right to sell, and though there was a surplus above what was necessary to pay the instalment due, yet that the trustee might reserve the whole and apply it to the residue of the mortgage debt. *Olcott* v. *Bynum*, 44.

TRUSTEE'S SALE (*continued*).

2. A sale of a large and valuable property under a deed of trust in the nature of a mortgage, held under the proofs to have been properly made in a body, and for cash alone, and on the premises themselves, though they were in a remote part of Virginia. *Olcott* v. *Bynum*, 44.

TRUTH AND VERACITY, REPUTATION FOR. See *Witness*, 1.

USE AND OCCUPATION.

One who enters into possession of land in virtue of an agreement that he is to be a purchaser of it, cannot be held liable for, if the purchase be concluded. *Carpenter* v. *United States*, 489.

VENDOR'S LIEN.

1. Exists as against a purchaser, having notice of the deed, in those States where such a lien prevails (as in Texas), when the deed shows on its face that the consideration is yet to be paid. *Cordova* v. *Hood*, 1.
2. Taking a note from the vendee with surety, though presumptively an abandonment of the lien, not so absolutely. The presumption may be rebutted. *Ib.*
3. The vendor's testimony, if positive, sufficient to do this. *Ib.*
4. Part payment of such a note—the note being for the payment of all and every part of the purchase-money so long as it remains unpaid—and taking a new note payable at the same time and in the same way as the original note, and the destruction of this last, does not displace the lien. *Ib.*
5. By the laws of Texas, an assignment of a note given for the purchase-money of real estate carries a vendor's lien. *Ib.*

VESSEL OF THE UNITED STATES. See *Navigation Laws.*

VOID PROCEEDINGS. See *Rebellion*, 8; *Service of Writ*, 1.

WAIVER OF EXCEPTION. See *Practice*, 1, 3.

WAIVER OF FRAUD. See *Implied Contract.*

WAIVER OF NOTICE OF NON-PAYMENT. See *Negotiable Paper.*

WAR RISKS.

Distinguished from marine risks. *Goodwin* v. *United States*, 515.

WITHDRAWAL OF APPEARANCE. See *Appearance.*

WITNESS.

1. Where the purpose of testimony is to impeach a witness for want of veracity, it is more proper to ask the person on the stand what is the general "reputation" for truth of the witness sought to be impeached, than to ask what is his general "character," &c. *Knode* v. *Williamson*, 587.
2. Cross-examination (including that of party who puts himself on the stand) matter within the discretion of the court below, and not, therefore, reviewable on error. *Rea* v. *Missouri*, 532.

WRIT. See *Service of Writ.*

WRIT OF ERROR. See *Appeal*, 1; *Jurisdiction*, 1, 2; *Practice*, 13, 14.

3 2044 106 524 358